No. 95-2074-CFX Title: City of Boerne, Petitioner
v.
P. F. Flores, Archbishop of San Antonio, and United States

Docketed:
June 26, 1996 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jun 25 1996	Petition for writ of certiorari filed. (Response due August 26, 1996)
	Jul 18 1996	Order extending time to file response to petition until August 26, 1996.
	Jul 18 1996	This extension is granted for all respondents.
	Aug 23 1996	Brief of respondent P.F. Flores, Archbishop of San Antonio in opposition filed.
	Aug 26 1996	Brief amicus curiae of Coalition for the Free Exercise of Religion filed.
	Aug 26 1996	Brief of respondent United States in opposition filed.
	Aug 26 1996	Brief amici curiae of Texas Municipal League, et al filed.
	Aug 26 1996	Brief amici curiae of Ohio, et al. filed.
	Sep 4 1996	DISTRIBUTED. September 30, 1996
	Sep 6 1996	Reply brief of petitioner City of Boerne filed.
	Oct 7 1996	REDISTRIBUTED. October 11, 1996
	Oct 15 1996	Petition GRANTED. SET FOR ARGUMENT February 19, 1997. **********
	Oct 31 1996	Record filed.
	Nov 8 1996	Record filed.
	Nov 26 1996	Brief amicus curiae of Thurston Greene in support of neither party filed.
	Nov 27 1996	Brief amicus curiae of National Trust for Historic Preservation in the U.S. filed.
	Nov 27 1996	Brief amici curiae of Children's Healthcare is a Legal Duty, Inc., et al. filed.
	Nov 27 1996	Brief amicus curiae of Center for Community Interest filed.
	Nov 29 1996	Brief amicus curiae of Clarendon Foundation filed.
	Nov 29 1996	Brief amici curiae of San Antonio Conservation Society, et al. filed.
	Nov 29 1996	Joint appendix filed.
	Nov 29 1996	Brief of petitioner City of Boerne filed.
	Nov 29 1996	Brief amici curiae of Ohio, et al. filed.
	Dec 17 1996	Order extending time to file brief of respondent on the merits until January 10, 1997.
	Dec 31 1996	Brief amicus curiae of National Committee for Amish Religious Freedom filed.
	Jan 8 1997	Brief amicus curiae of American Center for Law and Justice filed.
	Jan 10 1997	Brief amicus curiae of Texas filed.
	Jan 10 1997	Brief of respondent P.F. Flores, Archbishop of San Antonio filed.
	Jan 10 1997	Brief amicus curiae of American Bar Association filed.
	Jan 10 1997	Brief amici curiae of Edward M. Kennedy, et al. filed.
	Jan 10 1997	Brief amici curiae of Defenders of Property Rights, et al.

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No. 95-2074-CFX

Entry	Date	Proceedings and Orders
		filed.
	Jan 10 1997	Brief amici curiae of Maryland, Connecticut, Massachusetts and New York filed.
	Jan 10 1997	Brief amici curiae of Prison Fellowship Ministries, et al. filed.
	Jan 10 1997	Brief amici curiae of Orrin Hatch, et al. filed.
	Jan 10 1997	Brief amicus curiae of Knights of Columbus filed.
	Jan 10 1997	Brief amicus curiae of Church of Jesus Christ of Latter-Day Saints filed.
	Jan 10 1997	Brief amici curiae of Virginia House of Delegates and the Virginia Senate filed.
	Jan 10 1997	Brief amici curiae of Minnesota Family Council, et al. filed.
	Jan 10 1997	Brief amicus curiae of Rutherford Institute filed.
	Jan 10 1997	Brief amici curiae of United States Catholic Conference, et al. filed.
	Jan 10 1997	Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed.
	Jan 10 1997	Brief amicus curiae of Becket Fund for Religious Liberty filed.
	Jan 10 1997	Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.
	Jan 10 1997	Brief amicus curiae of National Right to Work Legal Defense Foundation, Inc. filed.
	Jan 10 1997	Brief amicus curiae of Virginia (RETURNED 30 TO BE RECOVERED) filed.
	Jan 10 1997	Brief of United States filed.
	Jan 10 1997	Brief amicus curiae of Coalition for the Free Exercise of Religion filed.
	Jan 10 1997	LODGING consisting of 10 copies of DOJ statistical reports submitted by counsel for amicus Coalition for the Free Exercise of Religion
	Jan 13 1997	Motion of the Acting Solicitor General for divided argument filed.
	Jan 14 1997	Motion of Ohio, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
	Jan 15 1997	CIRCULATED.
	Jan 17 1997	Opposition of petitioner to motion of Ohio, et al. for leave to participate in oral argument a filed.
	Jan 21 1997	Motion of the Acting Solicitor General for divided argument GRANTED.
	Jan 21 1997	Motion of Ohio, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument GRANTED. to be divided as follows: petitioners - 20 minutes; respondents - 20 minutes; the Acting Solicitor General - 15 minutes; amici curiae Ohio, et al. - 15 minutes.
	Feb 5 1997	LODGING consisting of the decision in Mockaitis, et al. v. Harcleroad, et al. from the U.S. Court of Appeals for the Ninth Circuit submitted by the Solicitor General and

No. 95-2074-CFX

Entry	Date	Proceedings and Orders
		distributed.
	Feb 10 1997	Reply brief of petitioner City of Boerne, Texas filed.
	Feb 19 1997	ARGUED.

FILED

No. 96-952074 JUN 25 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

—versus—

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

—and—

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

In 1990, this Court held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the First Amendment does not require governments to accommodate religious conduct in conflict with neutral, nondiscriminatory, generally applicable laws. *Smith*, 494 U.S. at 885. While legislatures *could* enact specific exemptions from generally applicable laws, such accommodation was not mandated by the Free Exercise Clause. *Id.* at 890. The majority's opinion in *Smith* was greeted with criticism by members of this Court, *see, e.g.*, *Smith*, 494 U.S. at 890 (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting), as well as others. *See e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1.

Congress not only disagreed with the *Smith* Court's reading of the Free Exercise Clause, it took action to repudiate *Smith* by enacting the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb (1993). RFRA is Congress's self-conscious attempt to expand the scope of protection for the free exercise of religion. By its terms, it dictates the standard of review all courts must apply to any federal, state, or local law burdening the exercise of religious conduct. If a law substantially burdens religious conduct, the government is required to accommodate it unless it can prove that its law serves "a compelling governmental interest" that is achieved by "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In effect, RFRA directs state and local governments to accommodate religious conduct more than the Supreme Court declared the Free Exercise Clause requires in either *Smith* or the pre-*Smith* case law.

The Questions that arise from the Fifth Circuit's decision affirming the constitutionality of RFRA are:

1. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by comman-

deering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

2. Whether Congress violated the separation of powers doctrine by legislatively overruling a Supreme Court determination of the scope of the Free Exercise Clause of the First Amendment.

3. Whether Congress violated the Establishment Clause of the First Amendment by broadly and exclusively privileging religion over other expressions of conscience.

4. Whether *Katzenbach v. Morgan*, 384 U.S. 641 (1966), should be overruled in part.

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JURISDICTION

The Fifth Circuit decision was reached on January 23, 1996; the petition for rehearing en banc, which was treated by the Fifth Circuit as a petition for rehearing, was denied on March 28, 1996. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254 (1994).

STATUTES INVOLVED

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb1-4 (1993), reprinted in the Appendix, *infra*, at 37a-40a.

STATEMENT OF THE CASE

In 1991, the City of Boerne, Texas, enacted a historical preservation ordinance intended to "protect, enhance and perpetuate selected historic landmarks," and to "safeguard the City's historic and cultural heritage." Boerne, Tex., Zoning Ordinance Amend. 91-05 (1992), reprinted in the Appendix, *infra*, at 41a. *See Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1354 (5th Cir. 1996).

In 1993, the respondent archbishop applied for a building permit from petitioner city to enlarge the Saint Peter Catholic Church, which is a revival mission-style church built in 1923. The city's Landmark Commission recommended denial of the

permit application. The City Council denied the church's appeal. The church then filed this suit, pursuant to 28 U.S.C. § 1331(a), alleging *inter alia* that the historic preservation ordinance violated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (1993).

During a pretrial hearing, the district court agreed to certify the question of RFRA's constitutionality pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States and for both parties to submit briefs addressing the constitutional issue. Both parties submitted briefs on the constitutional issue as did intervenor United States.

The district court held that RFRA was facially invalid because "Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA" and therefore infringed on the long-settled authority of the courts " 'to say what the law is.' " *Flores*, 877 F. Supp. 355, 357 (W.D. Tex. 1995) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). The court noted Congress's power under Section 5 of the Fourteenth Amendment, but did not find it a persuasive basis for congressional authority in light of "Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary." *Flores*, 877 F. Supp. at 357. The district court certified its order for interlocutory appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) and entered a partial final judgment under Fed. R. Civ. P. 54(b). The archbishop and the United States appealed.

The court of appeals reversed on four grounds. First, the court held that Congress acted within its power under Section 5 of the Fourteenth Amendment on the theory that RFRA is remedial because it prohibits "budding or disguised constitutional violations," "sprouting constitutional violations," and "incipient constitutional violations." *Flores*, 73 F.3d at 1359-60.

Second, the court addressed the city's separation of powers challenge to RFRA. The city had argued that RFRA violates the separation of powers by permitting Congress to legislate an interpretation of the Constitution at odds with the Supreme Court, relying on this Court's statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that it is the duty of the judiciary "to say what the law is." The court of appeals reasoned that because governments *may* accommodate religion more than the Free Exercise Clause requires, Congress has the power to force all governments to accommodate all religious conduct substantially burdened by a generally applicable law. It concluded: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive."

The court of appeals also termed as "facile" the United States' argument that RFRA is merely a statute that "provides legislative protection for a constitutional right over and above that provided by the Constitution." *Flores*, 73 F.3d at 1361. The court stated: "We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*." *Id.* Nevertheless, the court upheld RFRA on the theory that Section 5 permits Congress "an extraordinary exercise of power." *Flores*, 73 F.3d at 1362.

Third, the court rejected the city's argument that RFRA violates the Establishment Clause by privileging religion on the ground that RFRA does not coerce religious activity through "its own activities and influence." *Flores*, 73 F.3d at 1364. Finally, the court held that RFRA "on its face" does not violate the Tenth Amendment, but left "RFRA's applicability to particular areas of state regulation . . . for individual, case-by-case resolution." *Id.*

The city now requests this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

The Religious Freedom Restoration Act ("RFRA") requires government to accommodate religious conduct more than the Supreme Court has declared that the Constitution requires. It places this requirement on every government action—federal, state, and local—taken in the past and in the future. *See* 42 U.S.C. §§ 2000bb-2(1), 3(a). As the court below made clear, RFRA was passed for the purpose of repudiating this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Flores*, 73 F.3d at 1355.

RFRA is vast, intrusive, and rigid. Its supporters have looked to Section 5 of the Fourteenth Amendment as a source of congressional power, but they have concomitantly ignored the inherent constitutional limits to Congress's exercise of its Section 5 powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). RFRA violates three structural features of the Constitution which are intended to preserve liberty by limiting government's capacity for tyranny: federalism, separation of powers, and the Establishment Clause. Its presumptuous scope and heavy burden on state and local governments, exacerbated by numerous conflicting constructions of its language and reach, require Supreme Court review at this time.

I. THE FIFTH CIRCUIT'S DECISION UPHOLDING RFRA PRESENTS AN IMPORTANT FEDERAL QUESTION OF PRESSING NATIONAL CONCERN REGARDING THE EXTENT OF CONGRESSIONAL AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

This case presents an important federal question of congressional power under Section 5 of the Fourteenth Amendment that requires resolution by this Court. After almost three years in operation, the Religious Freedom Restoration Act has cast a pall over state and local governments attempting to

carry on the important and difficult job of serving the people.[1] These governments require a definitive declaration of the constitutionality of RFRA, which commands them to accommodate religious conduct more than the Constitution requires.

A. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Federalism Doctrine

In 1990, this Court issued a watershed opinion addressing the extent to which the Free Exercise Clause of the First Amendment requires governments to accommodate religious conduct in conflict with neutral, generally applicable laws. *See Employment Div. v. Smith*, 494 U.S. 872 (1990). In that opinion, the Court declared that the Free Exercise Clause does not require governments to grant an individual exemption for the religious adherent if the state has enacted a neutral, nondiscriminatory, generally applicable law. *Smith*, 494 U.S. at 885.

Before *Smith*, this Court's Free Exercise case law applied varying standards, depending on the context of the case.[2] In

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[1] RFRA applies to state, local, and federal government actions. *See* 42 U.S.C. § 2000bb-2(1). This case raises only the issue of Congress's power to enact RFRA against state and local governments, which is distinct from its power to enact RFRA against the federal government. *See generally* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 368-70 (1994).

[2] The context-dependent nature of this Court's pre-*Smith* Free Exercise jurisprudence is not unusual. This Court has often crafted constitutional rules under the Bill of Rights that are dependent on the particular context of a case. As Justice O'Connor pointed out in *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994) (O'Connor, J., concurring in part and concurring in the judgment):

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. . . . But the same constitutional principle may operate very differently in different contexts.

Id. at 2498-99.

a small number of cases, particularly those involving unemployment compensation benefits, this Court announced a compelling interest standard.[3] In a smaller number of cases, this Court announced a least restrictive means test, though it has never been used to invalidate a statute on Free Exercise grounds.[4] In others, this Court applied less exacting review, because the context demanded more deference to the government, and even applied rationality review in cases involving prisoners.[5]

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[3] *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378 (1990); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Bowen v. Roy*, 476 U.S. 693 (1986); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

[4] *See Thomas*, 450 U.S. at 718 (compelling interest and least restrictive); *Bowen*, 476 U.S. at 708; *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (rejecting less restrictive means alternatives); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (compelling interest and no less restrictive means available).

[5] *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-453 (1988) (not requiring compelling government justification); *Turner v. Safley*, 482 U.S. 78 (1987) (applying low level scrutiny in prison context); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (applying low level scrutiny in prison context); *Bowen*, 476 U.S. 693 (1986) (Burger, C.J., plurality) (applying relaxed level of scrutiny where government action indirectly affects religious conduct); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (adjusting level of scrutiny downward because "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-06 (1985) (not requiring exemption from government program unless at a minimum, program actually burdens claimant's freedom to exercise religious rights). A number of lower courts have held that RFRA repudiates the Court's prisoner Free Exercise cases. *See Jolly v. Coughlin*, 76 F.3d 468, 475 (2d Cir. 1996) (citing *O'Lone*, 482 U.S. at 350. *Hamilton v. Schriro*, 74 F.3d 1545, 1551 (8th Cir. 1996); *Hicks v. Garner*, 69 F.3d 22, 25-26 (5th Cir. 1995); *Werner v. McCotter*, 49 F.3d 1476, 1479 (10th Cir.), *cert. denied*, 115 S. Ct. 2625

In contrast to *Smith* and to this Court's Free Exercise jurisprudence before *Smith*, RFRA applies a single, extraordinarily high standard to every government action that burdens religious conduct. RFRA requires every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State," 42 U.S.C. § 2000bb-2(1), to accommodate religious conduct in every context unless the government proves that it acted with "a compelling governmental interest" and its actions are "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Not only does RFRA apply to every conceivable government entity, it also applies to every government action taken past, present, and future. 42 U.S.C. § 2000bb-3(a). By "setting forth a unitary [and difficult] test for a broad set of cases, [Congress has dramatically altered this Court's Free Exercise jurisprudence and has] done more harm than good." *Kiryas Joel*, 114 S. Ct. at 2499 (O'Connor, J.).

The Religious Freedom Restoration Act is a bold and unprecedented example of federal social policy engineering that commandeers the states to follow the federal government's decision to accommodate religion more than the Constitution requires. Thus, it violates core constitutional principles of federalism grounded in the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 145 (1992).[6] Congress is a body of enumerated powers, and it must respect state integrity in that exercise. *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1127, 1132 (1996); *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995); *New York*, 505 U.S. at

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(1995); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (per curiam); *Muhammad v. City of New York*, 904 F.Supp. 161, 187 (S.D.N.Y. 1995); *Alameen v. Coughlin*, 892 F. Supp. 440, 447 (E.D.N.Y. 1995); *Francis v. Keane*, 888 F. Supp. 568, 574-75 (S.D.N.Y. 1995); *Campos v. Coughlin*, 854 F. Supp. 194, 205 (S.D.N.Y. 1994).

[6] The Supreme Court recently granted certiorari in a case addressing the issue of Congress's power to commandeer the states to its policy ends. *See Printz v. United States*, No. 95-1478, *cert. granted*, 1996 WL 122493 (June 17, 1996).

156-157 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991). As this Court stated in *New York*, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *New York*, 505 U.S. at 162 quoting *Texas v. White*, 7 Wall. 700, 725 (1869).

In its zeal to advance religious liberty, Congress has transgressed this key structural constitutional feature—federalism—that was itself intended to ensure liberty by limiting concentrations of power. There are many constitutionally acceptable roads to religious freedom: particularized legislative exemptions in federal and state law based on specific legislative factfinding demonstrating that legislative intervention is necessary,[7] a congressional pledge (accompanied by appropriate efforts) to meet the highest ideals of religious liberty through the exercise of its various enumerated powers,[8]

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[7] *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L. J. 65, 94 n.121 (1996) (citing James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 (1992)) for the fact that there are up to 2,000 statutory accommodations of religion in state and federal law). The *Smith* decision, which refused to grant an exemption for peyote use by American Indians was followed by a variety of state statutes providing exemptions banning its use. In fact, thirteen states exempt religious use of peyote from criminal sanction. *See* Ariz. Rev. Stat. Ann. § 13-3402(B)(1) (1981) (providing that the religious use of peyote is a defense in prosecutions of drug offenses); Colo. Rev. Stat. Ann. § 18-18-418(3) (1992) (exempting peyote from criminal sanction if used in religious ceremonies of any bona fide religious organization); Idaho Code § 37-2732A (1991) (permitting the sacramental use of peyote); Iowa Code Ann. § 124.204(8) (1994) (same); Kan. Stat. Ann. § 65-4116(c)(8) (1987) (same); Minn. Stat. Ann. § 152.02(4) (1987) (same); Nev. Rev. Stat. § 453.541 (1973) (same); N.M. Stat. Ann. § 30-31-6 (1978) (same); Or. Rev. Stat. § 475.992(5) (1995) (same); S.D. Codified Laws § 34-20B-14(7) (1994) (same); Tex. Code Ann. § 481.111 (West 1989) (same); Wis. Stat. Ann. § 161.115 (West 1972) (same); and Wyo. Stat. § 35-7-1044 (1977) (same).

[8] "No constitutional principle . . . hinders Congress from pledging to meet the highest ideals of religious liberty through its various exer-

and vigorous enforcement of relevant provisions in state constitutions.[9] With RFRA, Congress has overstepped the bounds of its legitimate constitutional powers and made real the "fear of legislative usurpation" that animated the Framers' pivotal decision to institute a government of limited powers. Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 32 (1983). " 'The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." ' " *Gregory*, 501 U.S. at 458 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)). In the end, this case is not about religious liberty but rather about the power of Congress to alter the Constitution's liberty-preserving structure.

Fortunately, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

Congress has done in RFRA what—in our constitutional scheme—only the states may do themselves. Without question, the states voluntarily could protect religious liberty more robustly than the federal constitution through their own constitutions or through legislative action. *See Wisconsin v. Miller*, No. 94-0159 (Wis. June 20, 1996); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 725 (N.J. 1975); *see also supra* note 9. But *Congress*

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cises of its enumerated powers." Gressman & Carmella, *supra* note 7, at 140-41 (quoting Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 369 (1994)).

[9] *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275; and William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977).

may not curtail state and local government lawmaking by forcing the states to observe a higher standard of religious liberty than the Court has deemed the Constitution requires. *New York*, 505 U.S. at 161-65; *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (Burger, C.J., dissenting) (1983); *but see Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

Because of its expansive sweep, RFRA colors every dealing a state or municipality has with every religious believer, church, or religious organization. It has launched a veritable avalanche of litigation. After almost three years in operation, RFRA has been the subject of over 200 cases decided in the federal courts and over three dozen cases decided in the state courts. Reported decisions, of course, are only the tip of the iceberg; countless other RFRA motions and unreported decisions invisibly stand behind this busy RFRA docket.

The additional burden generated by RFRA has fallen heavily upon already-strapped state and municipal governments and courts, as it has called into question the enforcement of neutral, non-discriminatory regulations as diverse as local zoning ordinances, public school and highway safety statutes, and fair employment and public accommodation statutes.[10] RFRA has caused an explosion of litigation by prisoners against the thousands of departments of corrections around the country, both state and federal.[11] That burden has been made heavier by the uncertainty of RFRA's constitutionality.

The lower courts are split on RFRA's constitutionality as applied to state law. Although this Court in some cases might

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[10] *See, e.g., Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995), *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, *cert. denied*, 115 S. Ct. 460 (1994); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996).

[11] *See, e.g., Lawson v. Singletary*, No. 94-4663, 1996 WL 280447 (11th Cir. May 29, 1996); *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996); *Jolly*, 76 F.3d 468; *Hamilton*, 74 F.3d 1545; *Werner*, 49 F.3d 1476; *Akbar-El v. Muhammed*, 663 N.E.2d 703 (Ohio App. 1995). *See generally*, James C. Wilson, *RFRA: More Harm Than Good*, June 1996 Corrections Today 21.

be inclined to await a full-fledged split in authority, *see* Sup. Ct. R. 1, 10. RFRA's expansive impact and its patent unconstitutionality demand review at this time.[12] Indeed, the difficult task of interpreting RFRA has already generated a variety of splits in authority on statutory interpretation questions for which RFRA's constitutionality is an antecedent question.[13] By waiting, the Court leaves state and local governments at the mercy of myriad RFRA claims governed under uncertain, vague, and contested statutory standards.

An ample airing of views on RFRA's constitutionality has already occurred in the cases and the legal literature. Given RFRA's novelty and breathtaking sweep, lower court consensus on its scope or constitutionality will not happen. Because this Court has not had occasion to address with any specificity the relationship between Section 5 and the constitutional requirement of state autonomy, even those jurists in the lower courts addressing the question of RFRA's constitutionality as applied to state law and reaching similar conclusions have employed a variety of different rationales. Compare *Flores v. City of Boerne, Texas*, 73 F.3d 1352 (5th

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[12] Given the significant number of RFRA cases pending in the courts of appeals and the state courts of last resort, there may well be a split in authority, per Sup. Ct. R. 10(a), on the issue of RFRA's constitutionality by the time the Court considers this petition. In any event, a Rule 10 split in authority is not the sine qua non for Supreme Court review. The Court has seen fit to grant certiorari in many important cases even though a split was not present. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *New York v. United States*, 505 U.S. 144 (1992); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

[13] *Mack*, 80 F.3d 1175 (split on meaning of substantial burden); *In re Young*, 82 F.3d 1407, 1419-20 (8th Cir. 1996) (split on meaning of compelling interest in bankruptcy context); *see also Meyer v. Federal Bureau of Prisons*, No. 95-02263 (CRR), 1996 WL 284868 (D.D.C. May 24, 1996) at *2 (split on whether RFRA waives Eleventh Amendment sovereign immunity); *Gilmore-Bey v. Coughlin*, No. 93-6592 (CLB), 1996 WL 306762 (S.D.N.Y. June 5, 1996) at *2 (same).

Cir. 1996) (holding RFRA constitutional and rejecting arguments that it violates separation of powers, the Tenth Amendment, and Section 5 power), *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1432 (W.D. Wis. 1995) (rejecting argument that Congress overstepped its constitutional bounds in passing RFRA); and *Belgard v. State of Hawaii*, 883 F. Supp. 510 (D. Hawaii 1995) (holding that RFRA is constitutional because Congress did not prescribe a rule for decision, but sought to protect free exercise to an extent greater than the Supreme Court has interpreted the Constitution to require); with *Keeler v. Mayor & City Council of Cumberland*, No. Civ. A. S-96-167, __ F. Supp. __, 1996 WL 311701 (D. Md. June 10, 1996) (holding that RFRA violates the constitutional separation of powers by requiring the courts to employ a standard of judicial review for First Amendment cases which has been explicitly rejected by the Supreme Court); *Hamilton v. Schriro*, 74 F.3d 1545, 1557 (8th Cir. 1996) (McMillian dissenting) (arguing that RFRA is unconstitutional as beyond Congress's Section 5 power); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909, 937 (Cal. 1996) (Mosk, J., concurring) (asserting that RFRA requires a court to determine the degree religious conduct is central to a person's religious beliefs in order to decide whether the government has substantially burdened free exercise and is therefore constitutionally forbidden); and *Flores*, 877 F. Supp. 355 (1995) (holding RFRA unconstitutional as a violation of the separation of powers doctrine). *See also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (holding RFRA constitutional as applied to federal law); *In re Tessier*, 190 B.R. 396 (Bkrtcy. D. Mont. 1995) (holding that RFRA violates separation of powers doctrine by requiring courts to employ a balancing test the Supreme Court found unworkable in *Smith*); *In re Young*, 82 F.3d 1407, 1421 n.1 (1996) (Bogue, S.D.J., dissenting). In addition, commentators have produced a landslide of articles, proposing a panoply of theories, many of which weigh against RFRA.[14]

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[14] *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont. L. Rev. 5 (1995) (arguing RFRA is unconstitutional because it violates the sepa-

In light of the heavy burden imposed by RFRA on state and local governments, the fact that almost three years have

ration of powers doctrine); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) (arguing RFRA is unconstitutional because it violates the doctrine of incorporation and is inconsistent with the framers' intent that the first amendment be a disability applicable to Congress); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995) (discussing how RFRA circumvents the process of constitutional amendment and exceeds congressional power by infringing upon the reserved power of the states); Hamilton, *supra* note 1 (arguing that RFRA is unconstitutional as a violation of the doctrine of enumerated powers); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247 (1994) (arguing that RFRA is unconstitutional because it violates the Establishment Clause; and that Congress exceeded its Section 5 powers); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) (arguing that RFRA violates principles of federalism and the Establishment Clause); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 131 (1996) (arguing that RFRA violates separation of powers doctrine); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171 (1995) (arguing for a narrow construction of RFRA to save it from invalidation on federalism grounds); *but see* Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73 (supporting RFRA as clarification of free exercise jurisprudence, and claiming broad Section 5 legislative power); Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181 (1992) (urging that Congress overturn *Employment Div. v. Smith* under its Section 5 power); Douglas Laycock & Oliver S. Thomas, *Interpreting The Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) (arguing RFRA is constitutional and discussing how courts should enforce RFRA consistent with its vision of religious freedom accommodation); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994) (exploring RFRA interpretive issues and encouraging a standard affording broad protection for religious freedom); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996) (arguing that RFRA poses federalism issues but is constitutional as a legislative exercise of Section 5 power); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can*

already passed since its enactment, and the ever-expanding RFRA docket in both federal and state courts, we strongly urge this Court to grant certiorari on the issue of RFRA's constitutionality at this time.

This case is the appropriate vehicle for that inquiry. The constitutional issue was appropriately raised and carefully briefed below, before both the district court and the court of appeals. Both courts squarely addressed the issue, answering the question in opposite ways. *Flores*, 73 F.3d at 1362 (holding RFRA constitutional); *Flores v. City of Boerne*, 877 F. Supp. 355, 357-58 (W.D.Tex. 1995) (holding RFRA unconstitutional).

This case also offers a particularly good set of facts on which to test the appropriate limits federalism places on the scope of Section 5. Laws governing land use are of intense and substantial local concern. "Respect for local landmark laws is founded on principles of federalism." Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 Duke L.J. 1598, 1624 (1992). Thus, the enforcement of historic preservation law has been a matter left almost entirely to state and local governments, with supporting legislation from the federal government. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See generally*, Jane Papademetriou Kourtis, Comment, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. Envtl. Aff. L. Rev. 793, 798-804 (1989).

RFRA's tests of compelling interest and least restrictive means skew the balance of power between local governments and churches on land use issues, including preservation and zoning issues, to the detriment of local autonomy. *Civil Liberties for Urban Believers v. City of Chicago*, 1996 WL 89241 (N.D. Ill. Feb. 27, 1996). Before *Smith*, 494 U.S. 872, the

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Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment, 141 U. Pa. L. Rev. 1029 (1993) (suggesting RFRA is well within Congress's Section 5 power).

lower courts applied a variety of standards in zoning disputes involving churches. *See, e.g., Islamic Cent. of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 299, 303 (5th Cir. 1988) (requiring a showing that the statute was "narrowly drawn in furtherance of a substantial government interest" and holding the ordinance unconstitutional because of city's failure to "show the importance of its purpose or that it could not have been accomplished by means less burdensome"); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 305, 307 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) (indicating that the level of scrutiny changes from "rational basis" to "compelling interest" where there is a significant burden on religious conduct and holding the ordinance in question constitutional under the former test upon a finding of an "indirect financial burden"); *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 741 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (applying a balancing test and finding the city's "substantial interest" outweighed the burden on free exercise); *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (applying a three-part test including a compelling interest requirement and holding that city had "strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods"). Following *Smith*, 494 U.S. 872, and its relaxed Free Exercise standard, cities tended to prevail in zoning disputes involving property devoted to religious purposes. *See, e.g., First Assembly of God, Inc. v. Collier County, Fla.*, 20 F.3d 419, *modified*, 27 F.3d 526 (11th Cir. 1994); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991); *South Ridge Baptist Church v. Industrial Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990). The standard in RFRA requires more of municipalities than either *Smith*, 494 U.S. 872, or even many of the pre-*Smith* cases would have.

In a context of traditional state power, this case squarely presents the question whether Congress may dictate to state and local governments to accommodate religious conduct more than the Constitution requires.

B. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Separation of Powers Doctrine

As this Court recently stated, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, No. 94-1966, 1996 WL 287732 (June 3, 1996) at *6 (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)). The Supreme Court is "the branch whose distinctive duty it is to declare 'what the law is,' *Marbury v. Madison*, 1 Cranch, at 177," particularly when the Court is exercising its constitutional authority to interpret the Bill of Rights. *Lopez*, 115 S. Ct. at 1639-40 (Kennedy, J., concurring); *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). In the words of Alexander Hamilton:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Federalist No. 78 *in* The Federalist Papers 229 (Roy P. Fairfield ed. 1981). *See also Oregon v. Mitchell*, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part) ("[To] allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure."). RFRA, which is a straightforward repudiation of this Court's decision in *Smith*, 494 U.S. 872, violates this fundamental, "structural" constitutional principle. *See Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1463 (1995); *see also* U.S. Const. art. I, § 1; art. III, § I.

RFRA is Congress's unilateral declaration that the Free Exercise Clause requires much more than the Court declared it required in *Smith*. This reading of RFRA is amply supported by its language:

> The Congress finds that—
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> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; . . .
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; . . .

42 U.S.C. § 2000bb.

"[T]he language of these findings portrays Congress, not as a political organ well-suited to conduct the business of empirical research and policy implementation, but as a super-Supreme Court." *Hamilton*, 74 F.3d at 1566. This understanding of RFRA is further supported in the legislative history. *See* The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2 (1990) (opening remarks of Rep. Edwards) (noting that "[RFRA] responds to Employment Division v. Smith, a recent Supreme Court ruling that weak-

ened the long-held standard of review for religious freedom cases"); *id.* at 11 (statement of Rep. Sensenbrenner, Jr.) (Declaring RFRA's purpose to reinstate the compelling interest test that had been the law for 25 years prior to Smith); *id.* at 28-29, 31-32, 35 (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) (observing that the purpose of RFRA is to reinstate the compelling interest test recently dropped by the Supreme Court); *id.* at 49, 51 (statement of Rev. John H. Buchanan Jr., Chairman, People for the American Way Action Fund) (noting the breadth of support for RFRA because "it seeks to protect the fundamental principle of religious freedom which was indeed undermined by the Supreme Court in the Smith decision"); 139 Cong. Rec. E1216 (daily ed. May 11, 1993) (statement of Rep. Margolies-Mezvinsky) (stating that RFRA corrects *Smith*, "which severely limits" religious freedom); 138 Cong. Rec. E617 (daily ed. March 11, 1992) (statement of Rep. Edwards) (stating that RFRA "will undo the damage inflicted on the right of religious free exercise" created by the Court's decision in Smith); 137 Cong. Rec. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz) (observing that RFRA would "reverse the disastrous effects of a dastardly and unprovoked attack on our first freedom by the Supreme Court"). "RFRA's imposition of the compelling interest test on all free exercise claims is nothing less than a radical alteration of the Supreme Court's free exercise jurisprudence." *Hamilton*, 74 F.3d at 1567 (McMillian, J., dissenting).

RFRA's defenders have attempted to justify it as merely a statutory right, rather than the attempted constitutional revision that it is. Yet, as the court of appeals explicitly declared in this case, the notion

> that Congress has created a statutory right is facile and ultimately incomplete. . . . We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*.

Flores, 73 F.3d at 1361. "[D]espite the *prima facie* plausibility of the Siren notion that RFRA does not interpret the First

Amendment but merely protects free exercise rights by statute, the argument has no substance." It is, in a word, "sophistry." *Keeler*, 1996 WL 311701, at *7, *8. As the District Court held in this case, Congress may not interpret the Bill of Rights at odds with this Court's interpretation. *See Flores*, 877 F. Supp. at 356-57 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)).

Some have argued that *Morgan*, 384 U.S. 641, provides support for the proposition that Congress may, pursuant to Section 5 of the Fourteenth Amendment, "ratchet" constitutional liberties beyond what the Court has required. This theory, however, is fundamentally at odds with *Marbury*. As the court of appeals noted, in the conflict between Section 5 and other constitutional limitations, Section 5 power must give way: "if RFRA violates other constitutional provisions, it exceeds Congress' Section 5 authority." *Flores*, 73 F.3d at 1361. Predictably, the ratchet theory "has never been revisited, followed, or clarified by the Court," Gressman & Carmella, *supra* note 7, at 131; *see also* Conkle, *supra* note 14, at 59, and deserves to be definitively laid to rest by this Court. *See* Sec. II, *infra*. As discussed more fully below, this Court should grant certiorari in this case for that purpose.

C. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Establishment Clause Doctrine

By privileging religion over all other expressions of conscience, the Religious Freedom Restoration Act violates the Establishment Clause. *See generally Lawson v. Singletary*, No. 94-4663, 1996 WL 280447 (11th Cir. May 29, 1996) at *8 n.2. As this Court recently reaffirmed in *Rosenberger v. Rector & Visitors of Univ. Of Va.*, 115 S. Ct. 2510, 2521 (1995), governments are required to exercise neutrality toward religion. RFRA utterly lacks the "secular purpose" required under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Indeed, the language of RFRA and its legislative history are a log of Congress's decision to privilege religion over all

other types of beliefs and to meddle with the religious life of this nation. *See* 42 U.S.C. § 2000bb (Purpose); H.R. Rep. No. 88, 103d Cong., 1st Sess. 14 (1993) (RFRA was intended to implement the Free Exercise Clause—to protect religious freedoms and to eliminate legislation that obstructed the free exercise of religion.).[15]

II. THE SCOPE OF CONGRESSIONAL POWER TO REVISE THE BILL OF RIGHTS PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Supreme Court bears responsibility to delineate the constitutional scope of congressional power to legislate. *See United States v. Lopez*, 115 S. Ct. 1624 (1995) (Kennedy, J., concurring). As then-Justice Rehnquist has stated,

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome v. United States, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting). The scope of Congress's power under Section 5 of the Fourteenth Amendment has not been set-

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[14] Ironically, Congress stated in RFRA that it was not intended to alter existing Establishment Clause jurisprudence.

> 42 U.S.C. § 2000bb-4. Establishment clause unaffected:
>
> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

tled by this Court. Even in the area of racial discrimination, which is the core concern of the Fourteenth Amendment, and which has afforded this Court a significant number of opportunities to address Section 5's scope, this Court has yet to reach a consensus in a majority opinion. As the Court stated in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2114 (1995), "various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority."

Although the Court increasingly has exercised its responsibility to draw the line on congressional power, *see New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Lopez*, 115 S. Ct. 1624; *Adarand*, 115 S. Ct. 2097; and *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996), and has thereby constructed the foundation that supports a holding that RFRA exceeds Congress's constitutional authority, the Court has not clarified the full extent to which state sovereignty is an intrinsic limitation on the exercise of Section 5 powers.

RFRA was passed by Congress solely on the premise that *Morgan*, 384 U.S. 641, authorizes Congress unilaterally to expand the scope of incorporated rights against the states. *See Keeler v. Mayor*, 1996 WL 311701, at *4. In effect, RFRA's proponents argue that federalism places no meaningful limits on the exercise of Section 5 authority. To the contrary, the Court's "cases are quite clear that there are real limits to federal power." *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

RFRA's defenders have engaged in an overbroad reading of *Morgan* that tips "the scales too far" and is contrary to the basic structure of our federalist union. *See Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring); *see also Gregory*, 501 U.S. 452; *New York*, 505 U.S. 144. *Morgan* arguably stands for two propositions, one of which is unremarkable, the other more controversial. First, Congress may provide remedies for con-

stitutional infractions by the states. *Morgan*, 384 U.S. at 648. This straightforward principle follows directly from the language of Section 5, which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This remedial power may also be read to imply that Congress may—if necessary—enact prophylactic legislation demanding more than the Constitution requires where state and local governments have proved recalcitrant to the requirements of the Constitution. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989). At most, Congress's prophylactic power could permit Congress to exercise its legislative factfinding capacity to determine that the states and local governments have proved recalcitrant to the Constitution and to institute means of bringing them back within the constitutional fold. "The enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress." *Keeler*, 1996 WL 311701, at *11. In fact, "Congress abdicated its responsibility to investigate the particular state action which might have the potential of unconstitutionally burdening the free exercise of religion." *Hamilton v. Schriro*, 74 F.3d 1545, 1567 (8th Cir. 1996) (McMillian, J., dissenting).

Even under the prophylactic theory of *Morgan*'s first rationale, the Court has never placed its imprimatur on congressional action that extends constitutional boundaries against the states in the absence of a history of state recalcitrance to the constitutional standard. Unlike the Voting Rights Act, which is the repeated reference offered in support of RFRA, RFRA was not necessitated by a refusal by state and local governments to abide by the Constitution, thereby requiring prophylactic legislation. With regard to the Voting Rights Act, the Court has stated:

> Two points emerge vividly from the voluminous legislative history of the [Voting Rights] Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in

> certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

South Carolina v. Katzenbach, 383 U.S. 301, 309, 337 (1966); *see also Shaw v. Reno*, 509 U.S. 630 (1993); *Rome*, 446 U.S. at 182; *Gaston County, N.C. v. United States*, 395 U.S. 285 (1969). What "Congress has done through RFRA's passage under the banner of § 5 is dramatically different from its exercise of § 5 power in *Morgan* or in any other case to date." *Hamilton*, 74 F.3d at 1568 (McMillian, J., dissenting).

Neither the legislative history of RFRA nor any other identified source supports the position that state and local governments persistently and intentionally have refused to abide by the constitutional standard as set out in either *Smith* or the pre-*Smith* case law. The RFRA legislative history is replete with denigrations of *Smith* but only sporadically dotted with a limited number of anecdotal reports of religious suppression. RFRA is not a constitutionally legitimate prophylactic measure; rather, it is an extreme overenforcement of Section 5. *See Hamilton*, 74 F.3d at 1570 (McMillian, J., dissenting) ("This is not prophylaxis but unconstitutional interbranch hegemony.") RFRA is an aggrandizement of congressional power over and against the Supreme Court and in derogation of the states.

The *Morgan* decision's second, controversial rationale, the so-called "ratchet theory," would permit Congress to expand but not contract Fourteenth Amendment rights. *Morgan*, 384 U.S. at 651 n.10. This latter basis for the *Morgan* decision has proved to be a derelict on the waters. Gressman & Carmella, *supra* note 7, at 131; *see also* Conkle, *supra* note 14, at 67. The ratchet theory violates separation of powers principles as it permits Congress to overtake the core judicial function to declare "what the law is," as set forth in *Marbury v. Madison*,

1 Cranch (5 U.S.) 137 (1803). It was rightly and roundly criticized by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor in *Wyoming*, 460 U.S. 226 (Burger, C.J., dissenting), who stated that "[a]llowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." *Id.* at 262. Far from being vindicated, the ratchet theory was laid to rest in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which demarcated "a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter.' " *Wyoming*, 460 U.S. at 262; *see also* Conkle, *supra* note 14, at 52 ("*Morgan*'s theory of substantive congressional power must be regarded as suspect.").[16] The Court should grant certiorari in this case for the purpose of explicitly interring the ratchet theory of congressional power, which is in significant tension with this Court's views on federalism and separation of powers.

Contrary to the views of RFRA's proponents, who would distort Section 5 into a blank check for the exercise of congressional power against the states, Congress may not ignore principles of federalism when it exercises its Section 5 powers. Rather, federalism principles provide innate limitations on the exercise of Section 5 power. As this Court declared in *New York*, 505 U.S. at 159 per Justice O'Connor:

> just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the lim-

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[16] The uncertain status of *Morgan*'s ratchet theory has also been reflected in Congress. Sen. Orrin Hatch, who is one of RFRA's staunchest supporters, refused to vote in favor of the Human Life Bill on the grounds that it overturned *Roe v. Wade*, 410 U.S. 113 (1973), and therefore exceeded congressional authority under Section 5 of the Fourteenth Amendment. He stated that the only constitutional source for the bill was *Morgan* and he believed that *Morgan* was wrongly decided. Staff of Subcomm. on Separation of Powers of Senate Comm. on the Judiciary, 97th Cong., 1st Sess., Report on Human Life Bill, S. 158, Together with additional and minority views 35 (Comm. Print 1981).

> its of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether [the Act] oversteps the boundary between federal and state authority.

One year earlier, this Court stated in *Gregory v. Ashcroft* that "the Fourteenth Amendment does not override all principles of federalism." 501 U.S. at 469. The history of the Fourteenth Amendment makes it abundantly clear that "its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions." Alexander Bickel, *The Voting Rights Act Cases,* 1966 Sup. Ct. Rev. 75, 97.

RFRA's scope and content also require that the Court provide guidance as to the scope of Congress's Section 5 power as it relates to rights incorporated into the Fourteenth Amendment. This Court has never addressed this question.[17] *See Hamilton*, 74 F.3d at 1563 (1996) (McMillian, J., dissenting). Even if this Court were inclined to read the *Morgan* decision as providing an expansive ratchet power to Congress, the *Morgan* decision and the other Voting Rights Act cases speak only to Congress's power vis-a-vis the Equal Protection Clause. They say nothing of congressional power to "ratchet" rights incorporated into the Fourteenth Amendment from the Bill of Rights. The original purpose of the Fourteenth Amend-

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[17] The one case implicating Section 5 and incorporated rights is *Hutto v. Finney*, 437 U.S. 678 (1978). *Hutto* provides no guidance on RFRA, however, because it simply permits Congress to provide a remedy for constitutional evils identified by the Court. It does not raise the distinct and more troubling problem posed by RFRA: Congress invoking its Section 5 powers to require local governments to accommodate religious liberty more than the Constitution requires. The treatment to be accorded incorporated rights under Section 5 was not addressed by the Court of Appeals below, on the ground that the issue more properly should be addressed to the Supreme Court. *Flores v. City of Boerne, Texas,*, 73 F.3d 1352, 1358 (5th Cir. 1996).

ment was to empower Congress and the courts to eliminate state-sponsored racial discrimination. The Bill of Rights, by contrast, was designed to limit Congress itself. *See* Hamilton, *supra* note 1, at 361-64; *see also* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1582, 1595 (1995).

There is strong reason to provide Congress more latitude with respect to enforcing social equality than with respect to incorporated individual rights. *See Richmond*, 488 U.S. at 522-23 (Scalia, J., concurring); *Hutto v. Finney*, 437 U.S. 678, 717-18 (1978); *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). The lower courts have no direct Supreme Court guidance on this difficult issue directly raised by RFRA and therefore would benefit from direction by this Court.

This Court should grant certiorari in this case to embrace its constitutional responsibility to delineate the constitutional limits on Congress's exercise of its Section 5 authority, to address the vitality of the ratchet theory, and to correct the serious misstep that Congress has taken with RFRA in derogation of the states.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, or, in the alternative, hold this case for determination of *Printz v. United States*, No. 95-1478, *cert. granted*, 1996 WL 122493 (June 17, 1996).

Respectfully submitted,

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Dated: June 25, 1996

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50306

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Plaintiff-Appellant,

—and—

UNITED STATES OF AMERICA,
Intervenor-Plaintiff-Appellant,

—versus—

CITY OF BOERNE, TEXAS,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, EMILIO M. GARZA, and BENAVIDES,
Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

The City of Boerne, Texas, contends that Congress lacks the authority to enact the Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 42 U.S.C. § 2000bb et seq. The district court agreed. We are persuaded that the act is constitutional and reverse.

I.

The Saint Peter Catholic Church in Boerne, Texas, was built in 1923. In 1991, the Archbishop of San Antonio, Bishop Flores, authorized the parish to build a larger facility.

Some months later, the City of Boerne enacted Ordinance 91-05 in order to "protect, enhance and perpetuate selected historic landmarks" and to "safeguard the City's historic and cultural heritage." The Ordinance authorized the City's Historic Landmark Commission to prepare a preservation plan with proposed Historic Districts. The City Council adopted the Landmark Commission's proposal for designating a Historic District. Saint Peter was not designated as a historic landmark but at least part of the church was included within the District. According to Archbishop Flores, the Historic District included only its facade, but the City considered the entire structure to be within the District.

In 1993, the church applied for a building permit from the City to enlarge the church building, urging that its proposed addition did not affect the church's facade. The Landmark Commission denied the permit application, and the City Council, in turn, denied the church's appeal. The church filed this suit seeking a judicial declaration that the Ordinance was unconstitutional and violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., injunctive relief, and attorneys' fees.

The City's first mention of constitutionality came in a Proposed Joint Pre-trial Order asserting that "any interpretation or application of the Religious Freedom Restoration Act of 1993 which imposes a statutory revision in the applicable standards of First Amendment jurisprudence is not valid . . .

taking into account the operative provisions of Article III, the Free Exercise Clause of the First Amendment, Section 5 of the Fourteenth Amendment, and the Tenth Amendment." Over the church's objection, the district court granted the City leave to amend its answer to plead the unconstitutionality of RFRA as asserted in the pre-trial order.

The district court held that RFRA was facially invalid because it infringed on the authority of the judiciary "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The district court reasoned that "Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA." It was also persuaded that Congress had not invoked its power under Section 5 of the Fourteenth Amendment in enacting RFRA. The district court certified its order for interlocutory appeal to this court pursuant to 28 U.S.C. § 1292(b) and entered a partial final judgment under Fed. R. Civ. P. 54(b). The United States and the church appealed and petitioned for leave to appeal. We have jurisdiction.

II.

A.

Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), held that the First Amendment's Free Exercise Clause does not bar application of a facially neutral, generally applicable law to religiously motivated conduct. *Id.* at 881. Five months after *Smith*, Congress conducted its first hearing on a legislative response, the Religious Freedom Restoration Act of 1990. *See*, Hearing Before the Subcomm. on Civil and Constitution Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (hereinafter "1990 House Hearing"). The 101st Congress did not pass the bill, but it was reintroduced in the 102nd Congress, S. 2969, 102nd Cong., 1st Sess. (1991); H.R. 2797, 102nd Cong., 1st Sess. (1991), and again in the 103rd Congress. S. 578, 103rd Cong., 1st. Sess. (1993); H.R. 1308, 103rd Cong., 1st Sess. (1993).

B.

In enacting the Religious Freedom Restoration Act of 1993, Congress mandated that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government demonstrates that application of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). RFRA applies both to Federal and State law, whether enacted before or after RFRA became effective. 42 U.S.C. § 2000bb-3(a).

Congress found that "governments should not substantially burden religious exercise without compelling justification," and decried the Supreme Court's decision in *Smith*, asserting that it "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a). The Act's stated purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

III.

A.

Congress considered its constitutional authority to enact legislation to overturn *Smith*. *See* 1990 House Hearing at 51 (statement of Rev. John H. Buchanan, Jr.). Scholars critical of *Smith* found in Section 5 of the Fourteenth Amendment authority to enact RFRA. *See id.* at 51, 54 (statement of Rev. John H. Buchanan, Jr.), 72-79 (letter from Douglas Laycock); Congressional Research Service, The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis 30-31 (1992) (prepared by David Ackerman). Later hearings continued the study of Section 5 and the support it

would offer to such legislation. *See* Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102nd Cong., 2d Sess. 353-59 (1992) (statement of Douglas Laycock) (hereinafter "1992 House Hearings"); The Religious Freedom Restoration Act: Hearing Before the Senate Comm. on the Judiciary, 102nd Cong., 2d Sess. 92-97 (1992) (statement of Douglas Laycock) (hereinafter "1992 Senate Hearing").

Some thoughtful scholars questioned the authority of Congress under Section 5, at least as far as RFRA pushed it. *See, e.g.*, 1992 House Hearings at 385-94 (statement of Ira Lupu); 1992 Senate Hearing at 122-25 (statement of Bruce Fein). Congress ultimately believed that Section 5 of the Fourteenth Amendment granted it sufficient authority to enact the bill:

> Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. However, limits to congressional authority do exist. Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision. Because [RFRA] is well within these limits, the Committee believes that in passing the Religious Freedom Restoration Act, Congress appropriately creates a statutory right within the perimeters of its power.

H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993). The Senate report expressed similar views, noting that RFRA "falls squarely within Congress' section 5 enforcement power."

S. Rep. 111, 103d Cong., 1st Sess. 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

When RFRA reached the Senate floor for debate, no Senator questioned Congress' power under Section 5. The Senators expressing a view on the issue were persuaded that Section 5 provided ample authority. *See* 139 Cong. Rec. S14469 (statement of Sen. Grassley); 139 Cong. Rec. S14470 (statement of Sen. Hatch).

B.

That the Executive and Legislative branches also have both the right and duty to interpret the constitution casts no shadows upon Justice Marshall's claim of ultimate authority to decide. The judicial trump card can be played only in a case or controversy. The power to decide the law is an incident of judicial power to decide cases. There is no more. A power of review not rooted in a case or controversy would impermissibly draw to Article III the interpretive role of the Executive and Legislative branches of government. So it is that the familiar recitation that Congressional legislation comes to us with a presumption of constitutionality is a steely realism and not merely a protocol of manners or an empty formalism.

No party here contends and we express no opinion whether other delegations of legislative power, such as the Commerce Power, provide constitutional authority for the passage of RFRA. RFRA's legislative history more than satisfies our requirement that "we be able to discern some legislative purpose or factual predicate that supports the exercise of [Congress' Section 5] power." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). There is no question that Congress drew on its power under Section 5 in enacting RFRA. The district court's doubt that it did is without basis. The issue is whether that authority was there.

IV.

The City contends that RFRA is unconstitutional for four related reasons. First, Congress lacked the authority to enact

the statute under Section 5 of the Fourteenth Amendment. Second, the statute violates the separation of powers by returning to the courts the task of accommodating general laws and religious practices after *Smith* denied the judiciary's competence to do so. Third, RFRA violates the Establishment Clause of the First Amendment. Fourth, it violates the Tenth Amendment. We turn to these contentions.

A.

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The Thirteenth, Fourteenth, and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

The Supreme Court first considered the meaning of Section 5 in *Ex parte Virginia*, 100 U.S. 339 (1879). It upheld the constitutionality of an act prohibiting the disqualification of grand or petit jurors on account of race. *Id.* at 345, 346. The Court declined to read narrowly the power granted by Section 5:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

The civil rights legislation of the 1960's brought to court again questions regarding the power of Congress under the Civil Rights Amendments. In *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966), the Court rejected the argument that under Section 5 Congress could only prohibit acts that would violate the substantive provisions of the Fourteenth Amendment.

Referring to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), the Court held that the inquiry into what is "appropriate legislation" under Section 5 is whether the statute "may be regarded as an enactment to enforce [the Fourteenth Amendment], whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.' " *Id.* at 651.

Six years later, the Court reaffirmed this reading of Section 5. In *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), the Court upheld congressional prohibitions of literacy tests in state and national elections. *Mitchell* did strike down the guarantee of the right of 18-year-olds to vote in state elections, 400 U.S. at 118, but that decision rested on the exclusive role of states in conducting their elections. Justice Black explained that Congress' enforcement power was broad but not unlimited:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.

Id. at 128-29 (opinion of Black, J.).

In the years since *Mitchell*, the Court has adhered to these generally stated principles. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court upheld, against a federalism-based

Eleventh Amendment challenge, the application of Title VII, 42 U.S.C. § 2000e et seq., to the States. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority." *Id.* at 456. Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), a plurality of the Court expressed the view that Section 5 provided authority to remedy the effects of past discrimination, even though the Fourteenth Amendment only prohibited purposeful discrimination. *See id.* at 478 (opinion of Burger, C.J., joined by White and Powell, JJ.); *id.* at 500-02 (Powell, J., concurring). The Court in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2117 (1995), in holding that federal affirmative action programs are subject to strict scrutiny, did not question congressional power under Section 5. *Id.* at 2114.

The Thirteenth, Fifteenth, Eighteenth, Twenty-third, Twenty-fourth, and Twenty-six Amendments contain parallel grants of enforcement power to Congress. The Court has read those provisions in a similar fashion. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), the Court upheld provisions of the Voting Rights Act of 1965. Discussing Congress' power under Section 2 of the Fifteenth Amendment—which contains virtually identical language to Section 5 of the Fourteenth—the Court wrote that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* at 326. Quoting Chief Justice Marshall's opinion in *M'Culloch*, the Court explained:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with letter and spirit of the constitution, are constitutional.

Id. at 326 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Similarly, in *James Everard's Breweries v. Day*, 265 U.S. 545, 560 (1924), the Court, addressing the scope of Congress' power under Section 2 of the Eighteenth Amendment, held that Congress "may adopt any eligible and appropriate means to make [the Eighteenth Amendment's] prohibition effective."

This continued adherence to the principle that Congress may explicate textually located rights and obligations pursuant to Section 5 persuades us that the three-part test from *Morgan* remains the benchmark.

1.

The first inquiry under *Morgan* is whether RFRA "may be regarded" as an enactment to enforce the Fourteenth Amendment. It has been long established that the Due Process Clause of the Fourteenth Amendment incorporates the Free Exercise Clause of the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

We disagree with the City's argument that Congress' Section 5 authority is more limited when it acts to enforce provisions other than the Equal Protection Clause. Section 5 does not place conditions on Congress' authority to enforce the amendment. Congress has the power to enforce "the provisions of this article," not just the Equal Protection Clause. *United States v. Price*, 383 U.S. 787, 789 & n.2 (1966) (noting Section 5 empowers Congress to enforce "every right guaranteed by the Due Process Clause of the Fourteenth Amendment"); *see also* Cong. Globe, 42d Cong., 1st Sess. App. at 83 (1871) ("The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it.") (statement of Rep. Bingham). We reject the notion that there is any relevant hierarchy of constitutional rights within the Fourteenth Amendment. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989). At base, this

argument is little more than an invitation to revisit the incorporation of the First Amendment, an invitation addressed to the wrong court.

We think it beyond peradventure that Congress enacted RFRA to enforce the religious liberty protected from State infringement by the Due Process Clause. RFRA expressly declares its purpose "to restore the compelling interest test . . . and guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). The Act itself defines "exercise of religion" as that under the First Amendment. *See* 42 U.S.C. § 2000bb-2(4).

RFRA's legislative history leaves little room for doubt that Congress intended "to enforce the right guaranteed by the free exercise clause of the first amendment." S. Rep. 111 at 14 n.43, *reprinted in* 1993 U.S.C.C.A.N. at 1904. Witnesses at congressional hearings spoke eloquently of the need for legislation to defend individuals, particularly those from minority religions, from generally applicable laws that burden the exercise of religion. *See, e.g.*, 1992 House Hearings at 157-59 (statement of Edward Gaffney, Jr.); 1992 Senate Hearing at 5-6 (statement of William Nouyi Yang), 37-39 (statement of Dallin Oaks). Indeed, the Senate Judiciary Committee found the need for legislation to restore the pre-*Smith* compelling interest test in order "to assure that all Americans are free to follow their faiths free from governmental interference." S. Rep. 111 at 8, *reprinted in* 1993 U.S.C.C.A.N. at 1897-98.

2.

The second inquiry under *Morgan* is whether RFRA is "plainly adapted to that end." Although Congress' power to enforce the Amendment is not confined to "abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional," *Morgan*, 384 U.S. at 648-49, Section 5 does not permit Congress to rewrite the scope of the Amendment's provisions out of whole cloth. Rather,

Congress' power under Section 5 is remedial. Congress' constitutional power to legislate pursuant to Section 5 is tied to Congress' superior ability to find and redress nascent or disguised violations of the Amendment. In short, "Congress may act only where a violation lurks." *E.E.O.C. v. Wyoming*, 460 U.S. at 260 (Burger, C.J., dissenting).

The United States offers three remedial justifications for RFRA: 1) RFRA deters governmental violations of the Free Exercise Clause; 2) RFRA prohibits laws that have the effect of impeding religious exercise; and, 3) RFRA protects the free exercise rights of adherents of minority religions. We address each in turn.

The United States urges that RFRA is an effective means of prohibiting the unconstitutional targeting of religion through facially neutral laws. According to this view of RFRA, *Smith*'s requirement that individuals show that a law is not facially neutral or generally applicable has not been an effective means of rooting out laws hostile to a religion in particular or to religion in general. RFRA responds by requiring all laws that substantially burden the exercise of religion to pass the compelling interest test, a test well-suited to separating well-intentioned statutes from invidious ones. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J.) (noting that purpose of strict scrutiny is to "smoke out" illegitimate uses of race).

Congress could have reasonably concluded that *Smith*'s focus on facial neutrality and general applicability has been ineffective in identifying laws motivated by antagonism to a religion or to religion in general. As one witness testified before the Senate Judiciary Committee, "formally neutral, generally applicable laws have repeatedly been the instruments of religious persecution, even in America." 1992 Senate Hearing at 71 (statement of Douglas Laycock). Moreover, Congress found that "[a]fter *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators." H.R. Rep. 88 at 6. These considerations, analogous to those underlying the Voting

Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134, convince us that RFRA serves the remedial goal of identifying budding or disguised constitutional violations that would otherwise survive judicial scrutiny under *Smith*.

In a similar vein, the United States argues that even if the Constitution only prohibits governmental action taken with the intent of interfering with religious exercise, Congress may go farther, as it did with RFRA, and prohibit conduct that has the effect of burdening the exercise of religion. According to this view of RFRA, applying the compelling interest test to all laws, whether facially neutral or not, that have the effect of substantially burdening the exercise of religion is a prophylactic measure designed to ensure that government may not discriminate against a particular religion or religion in general. It is claimed to be an effective means of identifying both mature and sprouting constitutional violations, a prophylactic measure that prohibits some laws whose effect upon the free exercise of religion is so substantial that RFRA is fairly said to regulate incipient constitutional violations.

In cases involving racial discrimination, the Court has held that Congress may prohibit laws with a racially discriminatory effect, as it did in the Voting Rights Act of 1965, as an appropriate method of promoting the Amendment's purpose, even if the Constitution only prohibits laws with a racially discriminatory intent. *City of Rome*, 446 U.S. at 177. Similarly, Congress could reasonably conclude that prohibiting laws that have the effect of substantially burdening religion promotes the free exercise of religion. Congress heard much testimony regarding the severe burdens that facially neutral laws can impose on an individual's exercise of his religious beliefs. *See, e.g.*, 1992 House Hearings at 157-59 (statement of Edward Gaffney, Jr.) (discussing effect of *Smith* on various religious exercise).

A robust application of the compelling interest test may be uneven in exempting religious practices from statutes of general applicability and push courts into either an uncomfortable judging of the credibility of claims that practices are religious exercises or leaving each person a non-regulatable island unto

themselves, arguably concerns behind the pre-*Smith* timidity of its use. The concerns are large and, for some scholars, they are a compelling argument against RFRA. Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 452 (1994). But this begs the question of congressional power. That some generally applicable laws must yield their unwitting grasp of religious practices is the price Congress has chosen to pay to achieve its desired level of accommodation. "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations." *Morgan*, 384 U.S. at 653. "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.*

Finally, the United States claims that RFRA serves to protect religious minorities, thereby promoting the goals of both the Due Process Clause and the Equal Protection Clause. According to this view of RFRA, adherents of minority religions are disproportionately affected by facially neutral laws. Congress heard testimony regarding the effects of *Smith* on members of the Hmong, Jewish, Mormon, and Amish faiths. *See* 1992 Senate Hearing at 30-40; 1992 House Hearings at 104, 107-08, 406-09. Congress could reasonably conclude that more exacting scrutiny of facially neutral legislation that burdens a religious practice is needed to protect adherents of minority religions. *See* S. Rep. 111 at 8, *reprinted in* 1993 U.S.C.C.A.N. at 1897.

Relatedly, Congress could reasonably conclude that seeking religious exemptions in a piecemeal fashion through the political processes, particularly at the state or local governmental level, would place minority religions at a disadvantage. *See* The Federalist No. 10 (James Madison). *Smith* acknowledged that leaving accommodation to the political processes risked discriminatory treatment but viewed it as an "unavoidable consequence of democratic government." 494 U.S. at 890. Congress considered the effect the *Smith* decision would have on minority religions seeking accommodations through the political process and concluded that "State and local legislative bodies cannot be relied upon to craft excep-

tions from laws of general application to protect the ability of the religious minorities to practice their faiths." S. Rep. 111 at 8, *reprinted in* 1993 U.S.C.C.A.N. at 1897; *see also* 1992 House Hearings at 326 (statement of Douglas Laycock).

These justifications fit within the remedial power of Congress under Section 5. To our eyes, Congress considered the need for "appropriate legislation" to enforce the provisions of the Fourteenth Amendment and responded with legislation that is "plainly adapted" to that end.

The third inquiry under *Morgan* is whether RFRA is consistent "with the letter and spirit of the constitution." This inquiry requires us to determine whether RFRA violates any other provision of the Constitution. Congress's power to remedy constitutional wrongs is a one-way street. Congress may not violate other constitutional provisions while enforcing those of the Fourteenth Amendment. *Morgan*, 384 U.S. at 656. The City claims that RFRA violates three Constitutional provisions: 1) the separation of powers; 2) the Establishment Clause; and 3) the Tenth Amendment.

The City treats these arguments as independent of its Section 5 argument: Even if Section 5 authorizes Congress to enact RFRA, it is unconstitutional for these additional reasons. However, as *Morgan* makes clear, Congress has no power under Section 5 to violate other individual rights. Stated another way, if RFRA violates other constitutional provisions, it exceeds Congress' Section 5 authority. We will address each separately.

B.

The district court agreed with the City that RFRA violates the separation of powers by displacing the authority of the judiciary, established by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "to say what the law is." RFRA accomplishes this goal, according to the City, by reversing *Smith* and restoring the pre-*Smith* judicial standard for evaluating free exercise claims. In effect, Congress has created a new constitutional right and achieved a "substantive expansion of First Amendment doctrine." In short, the City

describes RFRA as nothing less than a constitutional coup d'etat, declaring that "[t]he new order under RFRA would overrule *Marbury* and craft a new standard of constitutional responsibility." The United States responds that RFRA "is simply a statute that provides legislative protection for a constitutional right over and above that provided by the Constitution."

The response that Congress has created a statutory right is facile and ultimately incomplete. RFRA creates a statutory right to be sure. The origins and framing of that right, however, are drawn from judicial decisions construing the Constitution. We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*. Indeed, Congress' announced purpose was "to 'turn the clock back' to the day before *Smith* was decided." H.R. Rep. 88 at 15 (statement of Rep. Hyde). Moreover, RFRA speaks in terms familiar to constitutional adjudication. To pass muster under RFRA, applicable laws must further a "compelling governmental interest" and be the "least restrictive means" of furthering that interest. This is a statutory rule, but it is a rule mandating a process rejected by the Court in *Smith*.

RFRA is also, in a sense, an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts—that is, strict scrutiny versus a form of intermediate scrutiny. This view includes an image of congressional second-guessing of the courts. But that sense is false. Congress by RFRA is demanding ad hoc review of laws of general applicability that substantially burden the free exercise of religion. This is functionally a regulation of nascent violations of the Free Exercise Clause, at least so long as the statutory trigger of *substantial* effect is given full force. It is true that the Court found that the Free Exercise Clause did not require the Court to accommodate laws of general applicability not aimed at a religious practice and that RFRA demands that the Court engage in an exercise that the Court has eschewed. Nonetheless, whether the courts must obey RFRA's command to do so turns only on the independent issue of the power of Congress under Section 5.

As we have otherwise explained, this is indistinguishable in any relevant way from the congressional command to examine election practices adversely impacting the voting strength of protected minorities, even though there was no purpose to discriminate and, hence, no violation of the Equal Protection Clause. Dispensing with the constitutionally rooted requirement that discrimination be purposeful is an extraordinary exercise of power. The insistence in *Washington v. Davis*, 426 U.S. 229, 239 (1976), upon proof of discriminatory purpose was a decision about the judicial role. At issue was whether the accent should be upon federal courts as arbiters of social justice or as a more passive arbiter of cases or controversies. The role of purpose becomes clear in the debate over its wisdom. *Compare* Laurence H. Tribe, American Constitutional Law § 16-20 at 1515 (2d ed. 1988) (urging that anti-subjugation should be test rather than purpose) *with* Patrick E. Higginbotham, Laurence Tribe's Visionary Theories of the Equal Protection Clause, 4 Benchmark 125, 131-34 (1990) (rejecting Tribe's view). The merits of that debate aside, it was common ground that dispensing with the requirement of *Washington v. Davis* that violations of the Equal Protection Clause must be purposeful works a large relocation of power. This is not to suggest that RFRA's dispensing with purpose is of a lesser magnitude. We doubt that it is. Rather, the point is that despite its large role, dispensing with purpose remains nonetheless an exercise of Congress' remedial power, the power to reach conduct that only threatens the free exercise of religion.

Undeniably, RFRA's origins and codification of terms drawn directly from constitutional decisions make it unusual and are characteristic of what is termed a "foundational statute." The critical question is whether they make RFRA unconstitutional. We think not.

The City's argument rests on the mistaken assumption that *Smith* describes not only how little the Government *must* accommodate religion but also how much it *may* accommodate it. Stated another way, the City must contend that *Smith* held not only that facially neutral laws having the incidental effect of burdening religion do not violate the Free Exercise

Clause but also that exemptions to such laws do violate either that clause or the Establishment Clause. Only if the latter proposition is true does RFRA usurp the judiciary's duty to interpret the Constitution.

This view of *Smith* has its supporters, *see* Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 450 (1994). Prior to *Smith*, the Court recognized that legislatures were free to enact religious exemptions more expansive and accommodating than that required by the Free Exercise Clause. *See Zorach v. Clauson*, 343 U.S. 306 (1952); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Even when the Court held that a particular religious accommodation violated the Establishment Clause, Justice Brennan cautioned that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (Brennan, J.).

Smith, however, did not change this rule. To the contrary, the Court contemplated "leaving accommodation to the political process:"

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. The Court noted with approval that several States, unlike Oregon, had exempted the sacramental use of peyote from their drug laws. *Id.*

Since *Smith*, the Court has reaffirmed that religious accommodations are constitutional. "Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Board of Educ. of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2492 (1994). Rather, " 'government may (and sometime must) accommodate religious practices . . . .' " *Id.* (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987)).

The City's separation of powers argument challenges this well-established rule. Every legislatively mandated accommodation of religion reflects a legislature's judgment regarding the free exercise of religion. RFRA does not usurp the judiciary's authority to say what the law is any more than did the Voting Rights Act of 1964 when it prohibited literacy tests after *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), had upheld their constitutionality. Nor does RFRA usurp the judiciary's interpretive powers any more than did the American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125, which overturns the particular result of *Smith* by preventing States from prohibiting Native Americans from using peyote as part of their religious practices. *See* 42 U.S.C. § 1996a(b)(1).

That RFRA speaks in broad generalities where other legislatively mandated religious exemptions, such those provided by the American Indian Religious Freedom Act, address specific conduct is of no moment. Within the area of permissible legislative accommodations of religion, Congress may paint with a broad or narrow brush. In either situation, Congress has "disagreed" with the judiciary regarding the scope of religious freedom and the Free Exercise Clause. In neither situation has Congress arrogated to itself the unrestricted power to define the Constitution.

In short, the judiciary's duty is to say what the law is, but that duty is not exclusive. The district court's holding that RFRA usurps the judiciary's power under *Marbury v. Madison* to interpret the Constitution is incorrect.

Nor are we persuaded by the City's argument that RFRA violates the separation of powers because it restores a test rejected in *Smith* as beyond the judiciary's competence to apply. *Smith* acknowledged that the legislative accommodation of religion "must be preferred to a system . . . in which judges weigh the social importance of all laws against the centrality of all religious beliefs." 494 U.S. at 890. However, the Court's rejection of the compelling interest test did not rest on judicial inability to apply the test. The compelling interest test is familiar to judges both in the context of free exercise claims, *see Smith*, 494 U.S. at 900-01 (O'Connor, J., concurring in the judgment), and elsewhere. *See, e.g., Adarand*, 115 S.Ct. at 2117 (subjecting all racial classifications to strict scrutiny).

Rather, the Court's rejection of the compelling interest test in free exercise claims rested on the Court's aversion to applying the test to facially neutral laws in the countermajoritarian arena of constitutional interpretation. *See* 494 U.S. at 888-889 (rejecting compelling interest test because it "would open the prospect of *constitutionally* required religious exemptions"). Again, it is one thing to apply the compelling interest test drawn from a statute where Congress can amend the underlying law if it disagrees with the resulting balance; it is another when the only response to the judiciary's application of the compelling interest test is a constitutional amendment.

We conclude that RFRA does not violate the separation of powers. Whether RFRA's requirement that judges determine whether a particular law "substantially burdens" the exercise of religion imposes upon the judiciary the duty of inquiring into the centrality of particular practices to a faith and whether that duty, if it exists, poses constitutional difficulties is not presented. *See Smith*, 494 U.S. at 887 & n.4. As we have explained, the full meaning of "substantially burdens" must be found in its application. It is self-evident that the vigor of the insistence that effects be substantial and the risks of error in locating incipient violations of the Free Exercise Clause are directly related. An anemic application of "sub-

stantial effect" pushes the limits of congressional power to remedy.

C.

Nor does RFRA mandate religious accommodations that violate the Establishment Clause. To the contrary, the act provides that "[n]othing in this chapter shall be construed to affect, interpret, or in any way address [the Establishment Clause]." 42 U.S.C. § 2000bb-4. In short, RFRA by its own terms provides that the accommodations mandated by RFRA may reach up to the limit permitted by the Establishment Clause but no further.

The City responds that, even so, RFRA on its face violates the Establishment Clause because it lacks a secular purpose and because it has the primary effect of advancing religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). We disagree. Its remedial justifications belie the City's contention that Congress acted with a sectarian purpose. Relatedly, "it is a permissible legislative purpose to alleviate significant governmental interference" with the exercise of religion. *Amos*, 483 U.S. at 335.

RFRA no more advances religion than any other legislatively, mandated accommodation of the exercise of religion. In *Amos*, the Court rejected the argument that an accommodation violates the primary effects prong of the *Lemon* test simply by virtue of being an accommodation. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337 (emphasis in original). RFRA's lifting of "substantial burdens" on the exercise of religion does not amount to the Government coercing religious activity through "its own activities and influence."

D.

Finally, the City urges that RFRA violates the Tenth Amendment because the act limits the power of the States to legislate "in the traditional areas of state sovereignty and prominence." The City mistakenly relies on the Court's decision last term in *United States v. Lopez*, 115 S.Ct. 1624 (1995), which held that the Gun Free School Zones Act exceeded Congress' power under the Commerce Clause. Congress, however, enacted RFRA pursuant to its power under Section 5 of the Fourteenth Amendment. Although the United States urges that the Commerce Clause also supports Congress' authority to enact RFRA, we have not reached that contention.

The Court has repeatedly noted that "the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments." *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). On its face, RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation.

That said, we do not suggest that the Tenth Amendment plays no role. *Gregory* itself recognized that the Court "has never held that the Amendment may be applied in complete disregard for a State's constitutional powers." *Id.* To the contrary, "the Fourteenth Amendment does not override all principles of federalism." *Id.* at 469. Indeed, the Court in *Gregory* refused to construe a congressional act to reach state governmental functions in the absence of a clear statement from Congress that it intended to do so. *Id.* at 470. Such questions of RFRA's applicability to particular areas of state regulation, however, are best left for individual, case-by-case resolution. It is enough for us to conclude that RFRA on its face does not violate the Tenth Amendment.

V.

We hold that Section 5 of the Fourteenth Amendment empowered Congress to enact the Religious Freedom Restora-

tion Act. We further hold that RFRA does not usurp the judiciary's power to interpret the Constitution. Accordingly, we REVERSE the order of the district court holding the Religious Freedom Restoration Act unconstitutional on its face and REMAND for further proceedings not inconsistent with this opinion.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-94-CA-0421

Filed March 15, 1995

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

—v.—

THE CITY OF BOERNE

ORDER OF INTERLOCUTORY APPEAL

BEFORE THE COURT, in the above-captioned cause of action, is the special issue raised by Defendant, the City of Boerne, in which Defendant challenges the constitutionality of the recently passed Religious Freedom Restoration Act, 42 U.S.C. § 2000bb [hereinafter RFRA].

BACKGROUND

The United States Congress passed RFRA in early November of 1993 and it was signed by President Clinton on November 16, 1993.

RFRA sets out in pertinent part:

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

> (a) IN GENERAL. —Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION. —Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a *compelling governmental interest*; and
>
> (2) is the least restrictive means of furthering that *compelling governmental interest*.

(emphasis supplied).

Such an Act under normal circumstances would be readily enforceable by this Court: however, it has come to the Court's attention that this Act seeks to overturn an interpretation of the United States Constitution by the Supreme Court. Indeed, in the Congressional Findings and Declaration of Purposes, the Congress specifically sought to create a heightened burden of proof standard from that held in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Findings state in pertinent part:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment of the Constitution . . .
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . .
>
> The Purposes of this Act are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to

> guarantee its application in all cases where free exercise of religion is substantially burdened. . . .

On February 2, 1995, the Court was made aware of Defendant's special issue during a pretrial hearing and agreed to 1) Certify the Question pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States of America, and 2) for both parties to submit briefs addressing the constitutionality of RFRA. On March 3, 1995, Defendant submitted its brief. On March 6, 1995, Plaintiff submitted its reply brief and the Solicitor General agreed to intervene on behalf of the United States of America, likewise submitting a reply brief.

ANALYSIS

According to the holding of *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch. 137, 2 L.Ed. 60 (1803). Subsequent Supreme Court cases have echoed this fact:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.

Baker v. Carr, 369 U.S. 186, 211 (1962). In *United States v. Nixon*, the Court stated:

> Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts by Article III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other

> conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed. 1938). We therefore reaffirm that it is the province and duty of this Court 'to say what the law is . . . .' "

418 U.S. 683, 704-05 (1974).

In this instance, Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA. The Supreme Court in *Smith* found the heightened standard applied in *Sherbert v. Verner*, 374 U.S. 398 (1963), to be limited over the years to cases within the unemployment compensation field. *Id.* at 884. The *Smith* Court added, "[e]ven if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable [ ] law." *Id.* The Court is cognizant of Congress' Authority under Section 5 of the Fourteenth Amendment, yet is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary.

The Court is cautious in its opinion of RFRA's unconstitutionality as there has been insufficient case law, to date, construing it. *See Belgard v. State of Hawaii*, No. 93-00961 (D. Haw. Feb. 3, 1995) (holding RFRA constitutional pursuant to Congress' enforcement power under Section 5 of the Fourteenth Amendment)[1] Nevertheless, *Smith* remains the law

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[1] This Court seriously questions the District Court of Hawaii's interpretation of RFRA's legitimacy through Section 5 of the Fourteenth Amendment. RFRA only mentions the First Amendment as the empowering provision to change the burden of proof standard to compelling interest. "Typically, the Court looks to the language of an Act or its legislative history for guidance on which power Congress understood itself to be invoking, and for factual support of its legal determination as to whether the power was invoked properly. As applied to federal law, Congress simply did not enter into such an inquiry regarding RFRA." Marci A. Hamilton, *The*

in this area for this Court to follow pursuant to the doctrine of *stare decisis*. The doctrine of *stare decisis* is not a universal, inexorable command, especially in cases involving the interpretation of the United States Constitution. *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S.Ct. 2791, 2861 (1992) (Rehnquist, J., dissenting). "Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983).

CONCLUSION

After reviewing the briefs on file and the law applicable to this area, the Court is of the opinion RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof as established under *Employment Division v. Smith*. Accordingly, the Court is of the opinion that this order holding RFRA to be unconstitutional "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation . . . ." 28 U.S.C. § 1292(b). Furthermore, the Court asks that expedited consideration of this appeal be had pursuant to F.R.A.P. Rule 5(a).

IT IS ORDERED the Religious Freedom Restoration Act of 1993 is unconstitutional.

Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 CARDOZO L. REV. 357, 366 (1994). Furthermore, because the First Amendment is not an enumerated power of Congress, but merely a limitation, *Katzenbach v. Morgan* and its progeny are inapplicable. The First Amendment to the Constitution does not empower Congress to regulate all federal law in order to achieve religious liberty, unless it is done pursuant to an enumerated power. *Id.* at 363.

IT IS FURTHER ORDERED that an Interlocutory Appeal to the Fifth Circuit Court of Appeals be had pursuant to 28 U.S.C. § 1292(b).

IT IS FURTHER ORDERED that expedited consideration of this appeal be had pursuant to F.R.A.P. 5(a).

IT IS FINALLY ORDERED the trial set for March 15, 1995 is stayed pending the outcome of the Interlocutory Appeal.

SIGNED this thirteenth day of March, 1995.

/s/ LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

APPENDIX C

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50306

Filed March 28, 1996
CHARLES R. FULBRUGE III CLERK

P F FLORES, Archbishop of San Antonio

Plaintiff-Appellant

—and—

UNITED STATES OF AMERICA

Intervenor-Plaintiff-Appellant

—v.—

CITY OF BOERNE

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO

ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 23, 1996, 5 Cir.F.3d)
(March 28, 1996)

Before

HIGGINBOTHAM, EMILIO M. GARZA and BENAVIDES,
Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR
STAY OF THE MANDATE.

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-94-CA-0421

Filed March 16, 1995

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

—v.—

THE CITY OF BOERNE

ORDER

Pursuant to the Court's February 3, 1995 Certification Order, it has provided the United States the right to intervene in the above-captioned action in order to defend the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. On March 6, 1995, the United States notified the Court that it elected to intervene in order to defend the constitutionality of the Religious Freedom Restoration Act and filed a brief on the issue on the same day. Accordingly,

IT IS HEREBY ORDERED that the United States is granted leave to intervene in this action.

SIGNED this 13th day of March, 1995.

/s/ LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50306

[Stamped and Filed in U.S. Court of Appeals
January 23, 1996
CHARLES R. FULBRUGE III CLERK]

[Stamped and Filed in Clerk, U.S. District Court
Western District of Texas
April 11, 1996
BY DEPUTY CLERK]

D.C. Docket No. SA-94-CV-421

P F FLORES, Archbishop of San Antonio

Plaintiff-Appellant

—and—

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellant,

—v.—

CITY OF BOERNE

Defendant-Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO

Before

HIGGINBOTHAM, EMILIO M. GARZA, and BENAVIDES,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the order of the district court in this cause is reversed, and this cause is remanded for further proceedings not inconsistent with this opinion

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: APRIL 09, 1996

OP-11-S

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ DAWN SHULIN
Deputy
New Orleans, Louisiana
April 09, 1996

APPENDIX F

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I

LEGISLATIVE DEPARTMENT

Section 1. [Legislative powers vested in Congress.]

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE III

JUDICIAL DEPARTMENT

Section 1. [Judicial power.]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

AMENDMENT 1

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. [Citizenship—Due process of law—Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Sec. 2. [Representatives—Power to reduce apportionment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United

States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

CHAPTER 21B—
RELIGIOUS FREEDOM RESTORATION

---

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wiscon-

sin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub.L. 103-141, § 2, Nov. 16, 1993, 107 Stat. 1488.)

* * *

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub.L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488.)

* * *

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub.L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489.)

* * *

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub.L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489.)

* * *

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or any any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub.L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

APPENDIX H

CITY OF BOERNE
ZONING ORDINANCE

INCLUDING ORDINANCE NO. 94-17
Adopted October, 1994

Adopted
August 22, 1983

Reprinted August, 1992

ZONING ORDINANCE
OF
THE CITY OF BOERNE, TEXAS

ORDINANCE NO. 83-12

A COMPREHENSIVE ORDINANCE REGULATING AND RESTRICTING:

- THE USE OF LAND,
- THE USE AND LOCATION OF BUILDINGS AND STRUCTURES,
- THE HEIGHT, NUMBER OF STORIES AND SIZE OF BUILDINGS AND OTHER STRUCTURES,
- THE CONSTRUCTION, RECONSTRUCTION, ALTERATION OR REPAIR OF BUILDINGS, STRUCTURES, OR LAND,
- THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED,
- THE SIZE OF YARDS, COURTS AND OTHER OPEN SPACES,
- THE DENSITY OF POPULATION;

DIVIDING THE CITY OF BOERNE INTO DISTRICTS FOR SUCH PURPOSE, ADOPTING MAPS OF SAID CITY SHOWING THE BOUNDARIES AND CLASSIFICATION OF SUCH DISTRICTS, ESTABLISHING A PLANNING AND ZONING COMMISSION AND A BOARD OF ADJUSTMENT, PRESCRIBING PENALTIES FOR VIOLATION OF ITS PROVISIONS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS:

ARTICLE I.

In General

SECTION 1. SHORT TITLE

This ordinance shall be known and may be cited as the "Zoning Ordinance" of the City of Boerne.

SECTION 2. PURPOSE

The zoning regulations and districts as herein established have been made in accordance with a comprehensive plan for the purpose of:

> promoting health, safety, morals and the general welfare of the City, and for the protection and preservation of places and areas of historical and cultural importance and significance therein.

They have been designed to:

- lessen congestion in the streets,
- secure safety from fire, panic, and other dangers,
- provide adequate light and air,
- prevent the overcrowding of land,
- avoid undue concentration of population,
- facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements.

They have been made with reasonable consideration, among other things, for:

- the character of the district and its peculiar suitability for particular uses.
- and with a view to conserving the value of the buildings,
- and encouraging the most appropriate use of the land throughout the City consistent with comprehensive planning.

AUTHORITY

SECTION 3. ORDINANCES REPEALED AND SCOPE

The following ordinances are herein repealed, to-wit:

A. The "Zoning Ordinance" of the City of Boerne, passed and adopted on April 23, 1973, amended on July 26, 1973.

B. All other ordinances or parts of ordinances inconsistent herewith, but only to the extent of such inconsistency; provided, however, that whenever higher or more restrictive standards are established by the provisions of any other applicable statute, ordinance or regulation than are established by the provisions of this ordinance, the provisions of such other statute, ordinance or regulation shall govern.

SECTION 4. ADOPTION OF LEGISLATIVE GRANT OF POWER

Articles 1011a through 1011k of the Revised Civil Statutes of the State of Texas are hereby adopted, and the provisions of the ordinance are adopted in the exercise of the power granted to municipalities by such statutes and pursuant to any and all other applicable laws.

SECTION 5. VALIDITY

If any section, paragraph, subdivision, clause, phrase, or provision of this ordinance shall be adjudged invalid or held unconstitutional, the same shall not affect the validity of this ordinance as a whole, or any part or provision thereof, other than the part so decided to be invalid or unconstitutional.

ORDINANCE NO. 91-05

AN ORDINANCE AMENDING ORDINANCE NO. 85-11 CAPTIONED "ARTICLE VIII. HISTORIC LANDMARK PRESERVATION, "PROVIDING FOR PROCEDURES FOR THE CREATION OF HISTORIC DISTRICTS, THE ISSUANCE OF BUILDING PERMITS IN A HISTORIC DISTRICT, AND FOR HISTORIC LANDMARKS, PROVIDING FOR TAX EXEMPTION FOR BUILDINGS SUBSTANTIALLY REHABILITATED AND/OR RESTORED; PROVIDING FOR A PENALTY; AND DECLARING AN EFFECTIVE DATE.

WHEREAS, the Legislature of the State of Texas has enacted Article 1011a, Vernon's Annotated Civil Statutes, empowering cities of the State of Texas to adopt regulations and restrictions for the preservation and protection of historical places and areas of historical and cultural importance and significance; and

WHEREAS, the City Council of Boerne is aware that the City of Boerne has various areas, places, buildings, and structures having significant historical value which reflect the heritage of the City, the State, and its people; and

WHEREAS, it is recognized that rapid change in population, economic functions and land use activities has led and is leading to the increased demolition of these landmarks so that the City, the State, and the Nation are thereby losing a part of their heritage;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS:

That Ordinance No. 85-11, dated May 20, 1985, and all amendments thereto, are hereby canceled and superseded by the following ordinance:

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE CITY OF BOERNE BY ADDING AN ARTICLE VIII ENTITLED "HISTORIC LAND-

MARK/HISTORIC DISTRICT PRESERVATION"; PROVIDING A DECLARATION OF POLICY; PROVIDING FOR A DEFINITION OF HISTORIC LANDMARK AND HISTORIC DISTRICT; PROVIDING FOR THE CREATION OF A HISTORIC LANDMARK COMMISSION; PROVIDING FOR THE SELECTION OF A HISTORIC LANDMARK PRESERVATION PLAN; PROCEDURE FOR SEEKING HISTORIC LANDMARK DESIGNATION AND REMOVAL; PROCEDURE FOR SEEKING BUILDING PERMIT; PROCEDURE WHEN BUILDING PERMIT IS NOT REQUIRED; PROCEDURE FOR REQUESTING PUBLIC OWNERSHIP OR CONTROL OF HISTORIC LANDMARKS; PROVIDING FOR APPEAL PROCEDURE; PROVIDING FOR A PENALTY; PROVIDING FOR TAX EXEMPTION FOR BUILDINGS SUBSTANTIALLY REHABILITATED AND/OR RESTORED; PROVIDING FOR TAX EXEMPTION REMOVAL; PROVIDING FOR THE DEMOLITION OF HAZARDOUS STRUCTURES; PROVIDING A SEVERABILITY CLAUSE AND DECLARING AN EFFECTIVE DATE.

ARTICLE VIII.

HISTORIC LANDMARK PRESERVATION

Declaration of Policy

The City Council hereby finds and declares as a matter of public policy that the protection, enhancement, preservation and use of historic la dmarks is a desirable public goal and is needed in the interest of the culture, prosperity, education and general welfare of the people. The purposes of this Section are:

(a) To protect, enhance and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's and State's architectural, archeological, cultural, social, economic, ethnic and political history and to develop appropriate settings for such places.

(b) To safeguard the City's historic and cultural heritage, as embodied and reflected in such historic landmarks, by appropriate regulations.

(c) To stabilize and improve property values in such locations.

(d) To foster civic pride in the beauty and accomplishments of the past.

(e) To protect and enhance the City's attractions to tourists and visitors and provide incidental support and stimulus to business and industry.

(f) To strengthen the economy of the City.

(g) To promote the use of historic landmarks for the culture, prosperity, education and general welfare of the people of the City and visitors to the City.

SECTION 1. DEFINITIONS

1.1 Historic Landmark.

As used in this ordinance, the term "Historic Landmark" shall mean any building, structure, site, area or land of architectural, historical, archeological or cultural importance or value, which the City Council has determined should be protected or preserved .

1.2 Historic District.

Districts which may be designated as Historic Districts shall mean geographically definable areas possessing significant concentrations, linkage or continuity of buildings, structures, sites, areas or lands which are united by architectural, historical, archaeological or cultural importance of significance.

SECTION 2. HISTORIC LANDMARK COMMISSION—CREATED

2.1 *Composition*: There is hereby created a Commission to be known as the "Historic Landmark Commission" of the City of Boerne, Texas.

2.2 *Qualifications*: To the extent possible, the City Council shall appoint members to the Commission who have a background in architecture, urban design, history, or similar professions or have an historical preservation interest.

2.3 *Terms of Office*: The appointed members of the Commission shall be identified by place numbers one (1) through nine (9). Upon adoption of this ordinance, places one (1) through five (5) shall be appointed to serve two (2) years. Places six (6) through nine (9) shall be appointed to serve four (4) years. After the first term expires, all terms shall be for four (4) years . Any vacancy occurring shall be filled by appointment only for the unexpired portion of the term. Any member may be removed by the City Council after a hearing. The Chairman and Vice-Chairman shall be appointed by the City Council.

2.4 *Meetings*:

2.4.1 *Regular Meetings.* Regular meetings may be held at the call of the Chairman or at the request of any five (5) Commission members. All members shall have seven (7) calendar days prior notice of the meeting, excluding the day of the notice and the day of the meeting.

2.4.2 *Special Meetings.* The Chairman shall call a special meeting within five (5) working days of receiving notice from the Building Inspector to consider the issuance of a Certificate of Appropriateness.

2.5 *Voting and Quorum*: The presence of six (6) appointed members constitutes a quorum at a regular meeting. No action may be taken on an application without a quorum present. The concurring vote of three-fourths (3/4) of the present members is necessary to make a motion or decision valid. Special meetings called by the Chairman to discuss the issuance of a certificate of appropriateness shall require five members to constitute a quorum. The concurring vote of 80% of the members present is necessary to make a motion or decision valid.

2.6 *Conduct of Business*: The Commission shall adopt rules for the conduct of its business and election of officers other

than the Chairman and Vice-Chairman. The minutes of all meetings shall be kept and shall be available for public inspection in the office of the City Secretary.

2.7 *Hearings and Notice*: The Commission shall not act upon any request for historic landmark designation or upon any request for a building permit or certificate of appropriateness without having first given the applicant for the designation or permit adequate notice of the Commission meeting and his/her right to be present and to be heard if so desired. All meetings shall be open to the public. Notice of meetings shall also be posted on the appropriate bulletin board in City Hall prior to the meeting date in compliance with current State Laws.

SECTION 3. HISTORIC LANDMARK PRESERVATION PLAN

3.1 The Commission shall thoroughly familiarize itself with buildings, structures, sites, districts, areas, and lands within the City which may be eligible for designation as historic landmarks and shall prepare an historic landmark preservation plan, hereinafter referred to as the "Preservation Plan," which shall be for the general guidance of City government, City property owners and the Commission. The plan shall:

3.1.1 Establish criteria to be used in determining whether certain buildings, structures, sites, districts, areas, lands and other objects should be designated as historic landmarks.

3.1.2 Establish guidelines to be used in determination of whether to grant or deny certificates of demolition or removal.

3.1.3 Formulate a program for private and public action which will state the role of various City agencies in preservation of historic landmarks.

3.1.4 Suggest sources of funds for preservation and restoration activities and acquisitions, to include federal sources, state sources, foundation sources, local private sources, as well as municipal assistance.

3.1.5 Recommend to the proper local agencies incentives to be offered to encourage historic preservation.

3.2 The Preservation Plan shall be presented to the City Planning and Zoning Commission for consideration and recommendation to the City Council for inclusion in the comprehensive plan of the City of Boerne.

SECTION 4. PROCEDURE FOR SEEKING HISTORIC LANDMARK DESIGNATION

4.1 Any person or entity may request an historic landmark designation for property owned by such person or entity by submitting an application in duplicate to the City Administrator, City of Boerne, stating the following:

4.1.1 Name, telephone number and mailing address of applicant.

4.1.2 Location and address of property to be designated.

4.1.3 Reasons for requesting the designation. This section of the application need not be extensive but should include, if available, approximate time of construction, and past and present usage of the building.

4.2 Upon receipt of such application, the City Administrator shall submit a copy of the application to the Chairman, Historic Landmark Commission, who shall initiate a review of the application within the following thirty (30) days. The concurring vote of 3/4 of the members present shall approve or otherwise reject such application. Upon approval by the Commission after a public hearing, the application shall be presented to the City Planning and Zoning Commission for their review, comment and referral to the City Council. The City Council may designate said property as an historical site, area, or building if within the discretion of the City Council such property is deemed to have historical, cultural, archeological or educational value which reflects the heritage of the City.

4.3 Should such application be rejected by the Historic Landmark Commission or the Planning and Zoning Commission, the applicant will be so notified and applicant may, within sixty (60) days, appeal the decision to the City Council. All decisions of the Historic Landmark Commission and the Planning and Zoning Commission, either to approve or disapprove an application, shall be reported to the City Council.

4.4. The suffix "H" for Historic Landmark designation shall be used in addition to the conventional designation established by the Zoning Ordinance for the particular land parcel, area, or district involved.

SECTION 5. PROCEDURE FOR REMOVAL OF HISTORIC LANDMARK DESIGNATION

The designation of an historic landmark may be removed at the request of the original petitioner by making such a request known to the Landmark Commission. The request for removal will contain information pertaining to the future use and disposition of the designated landmark.

A request for historic landmark designation removal shall be acted on by the Landmark Commission within thirty (30) days after receipt of a request for designation removal. The Commission shall base their decision on information in the request, and may recommend to the City Council that the petition be granted immediately or delayed for a period of up to one hundred eighty (180) days while Commission proceeds under SECTION 8. If at the end of this period no action has been taken by the City, the designation shall be automatically removed.

The Landmark Commission shall provide information and counseling to owners of designated historic landmarks upon their request.

SECTION 6. CREATING HISTORIC DISTRICTS

The City Council may, from time to time, designate certain areas in the City of Boerne as Historic Districts, and define, amend or eliminate the boundaries of same.

For purpose of clarity in the zoning designation of property, the zoning maps shall reflect property in historic districts by the inclusion of the letter "H" as a suffix on the map designation.

Nothing contained in this article or in the designation of property as being in an historic district or historic landmark shall affect the present use of the property. Use classification as to all property which may be included in an historic district shall continue to be governed by the Zoning Ordinance of the City of Boerne and the procedures established therein.

Procedure for Creation and Amendment of an Historic District:

6.1 Before the Landmark Commission. The Landmark Commission shall recommend to the Planning and Zoning Commission those areas it determines should be included in an Historic District. In making the recommendation, the Landmark Commission shall consider one or more of the following criteria:

6.1.1 Character, interest or value as part of the development, heritage or cultural characteristics of the City.

6.1.2 Location as the site of an historical event.

6.1.3 Embodiment of distinguishing characteristics of an architectural type or specimen.

6.1.4 Relationship to other distinctive buildings, sites, districts or structures which are historically significant and preserved, or which are eligible for preservation.

6.1.5 Unique location of singular physical characteristics representing an established and familiar visual feature of a neighborhood, community or the City.

6.1.6 Value as an aspect of community sentiment or public pride.

6.1.7 Identification with a person or persons who significantly contributed to the development or culture of the City.

6.2 The Landmark Commission shall prepare and forward to the Planning and Zoning Commission the following information:

6.2.1 A list of specific buildings, structures, areas or lands of importance or value within the proposed district boundaries and a description of how the particular building, structure, site, area or land meets the aforementioned criteria.

6.2.2 A map showing the boundaries of the proposed Historic District.

6.2.3 The Landmark Commission shall hold a public hearing for those owners of real property within the proposed Historic district . Those owners shall be notified not less than ten (10) days before the date of the hearing.

Following the hearing, the Landmark Commission shall forward to the Planning and Zoning Commission its recommendation.

Before the Planning and Zoning Commission.

The Planning and Zoning Commission shall give notices, conduct its hearing and make recommendations to the City Council in the same manner and according to the same procedures as specifically provided in ARTICLE V, SECTION 5.A of the City of Boerne Zoning Ordinance.

Before City Council.

The City Council shall accept recommendations from the Planning and Zoning Commission and follow those proce-

dures set forth in ARTICLE V, SECTION 5.B of the City of Boerne Zoning Ordinance.

SECTION 7. EVALUATION OF PROPOSED EXTERIOR CHANGES TO STRUCTURES WITHIN A HISTORICAL DISTRICT OR DESIGNATED HISTORIC LANDMARK

7.1 The Building Inspector shall review and determine whether or not the proposed exterior changes require a building permit or certificate of appropriateness to be issued. The Building Inspector shall notify the Chairman within two working days of receiving the plans.

7.1.1 *Procedure for the Landmark Commission When A Building Permit Is Required.* The Chairman, upon receipt of the Building Inspector's recommendation that a building permit is required, shall call for a regular meeting of the Landmark Commission within seven (7) calendar days.

7.1.1.1 Upon receipt of an application for a building permit for the construction, reconstruction, alteration, restoration, relocation, demolition or razing of a building or buildings in the historic district or historic landmark, the Landmark Commission shall schedule a meeting to consider the recommendation which the Commission will give to the Building Inspector. The person applying for the permit shall be advised of the time and place of said meeting in writing and invited to appear to explain his reasons therefor. The Landmark Commission may invite such other persons or groups as it desires to attend its meetings.

7.1.1.2 *Historic Districts & Historic Landmarks.* In determining the recommendation to be presented to the Building Inspector concerning the issuing of a permit for the construction, reconstruction, alteration, restoration, relocation, demolition or razing of all or part of any building within the historic district, and/or all or part of any designated historic landmark, the

Landmark Commission shall consider the following matters:

(a) The effect of the proposed change upon the general historic cultural and architectural nature of the district.

(b) The appropriateness of exterior architectural features which can be seen from a public street, alley, trail or walkway.

(c) The general design, arrangement, and material of the building or structure and the relation of such factors to similar features of buildings or structures in the district.

(d) The criteria used shall not be the aesthetic appeal to the Landmark Commission of the structure or the proposed remodeling, but rather its conformity to the general character of the Historic District.

(e) Harmony with adjacent buildings (scale, height and mass).

(f) The value of the historic district as an area of unique interest and character and its not being impaired.

7.1.1.3 Upon review of any application, if the Landmark Commission finds the proposed work of a nature which will not adversely affect any significant historical landmark, and is appropriate and consistent with the spirit and purposes of this article, it shall enter this decision into the official minutes and so advise the City Building Inspector who will then issue the Building Permit. No change contrary to the intent of this article shall be made in the building plans or the permit application after the application has been approved by the Landmark Commission without the written approval of the Landmark Commission of such desired changes.

7.1.1.4 If the Commission finds that the proposed work will adversely affect or destroy any significant historical feature of the designated historic landmark or is inappropriate or inconsistent with the spirit and purposes of this article, it shall enter this decision into the official minutes and so advise the City Building Inspector in writing. The written decision shall also describe the changes that will be necessary before the permit application can be approved. The City Building Inspector shall forward a copy of this decision to the applicant as soon as received.

7.1.1.5 If the applicant is willing to comply with the changes described by the Commission, he may make any required changes in the plans and the application and resubmit the application to the Commission in the same manner as previously described.

If the applicant is unwilling to comply with the changes described by the Commission, the Building Permit shall not be approved and issued.

7.1.1.6 Action shall be taken on any application for a Building Permit within forty-five (45) days after the application has been received by the Landmark Commission Chairman. If no action is taken within the forty-five (45) day limit, the Building Permit shall be deemed approved and the City Building Inspector shall immediately so advise the applicant in writing.

7.1.1.7 Ordinary repair or maintenance which does not involve changes in exterior architectural features and which does not otherwise affect the historical value or style of a structure within a historical district or a designated historic landmark shall be exempt from the provisions of Section 7.1.1. (For purposes of this Section 7.1.1, "exterior architectural features" is construed to include but is not limited to architectural style and general arrangement of such portion of the exterior of a structure as is desired to be open to view from a public way).

7.1.2 *Procedure for Obtaining A Certificate of Appropriateness.*

Any proposed exterior changes and alterations not requiring a building permit as determined by the Building Inspector shall be forwarded to the Chairman of the Historic Landmark Commission who shall call a special meeting within five (5) calendar days of receiving the request.

7.1.2.1 Any proposed exterior changes and alterations not requiring a building permit as determined by the Building Inspector shall be submitted in writing directly to the Historic Landmark Commission for a Certificate of Appropriateness, which must be granted before such work can be undertaken.

The application must specifically describe the alterations or changes proposed. Any applicant may appear at a regular or special meeting of the Commission before submitting an application and may consult with said Commission during the review of the application.

7.1.2.2 Upon review of the application, if the Commission finds the proposed work of a nature which will not adversely affect any significant architectural or historical feature of a designated historic landmark, and which is appropriate and consistent with the spirit and purpose of this article, it shall forward a Certificate of Appropriateness to the applicant within thirty (30) days of the receipt of said application.

7.1.2.3 If the Commission finds that the proposed work will adversely affect or destroy any significant architectural or historical features of the designated historic landmark, or is inappropriate or inconsistent with the spirit and purpose of this article, it shall notify the applicant within thirty (30) days of receipt of said application that the application has been disapproved.

7.1.2.4 If no action has been taken by the Commission within the prescribed time for approval or disapproval, the application shall be deemed approved.

7.1.2.5 No change shall be made in the application for issuance of a Certificate of Appropriateness without resubmittal to the Commission and approval of the changes in the same manner as provided above.

7.1.2.6 After a decision is reached by the Commission denying an application for a Certificate of Appropriateness, a resubmittal of an application will not be accepted for an additional hearing within a six (6) month period from the date of final decision except upon written request of the applicant, indicating the incorporation of all changes in plans and specifications to the original application as recommended by the Commission which would protect the distinctive character of the historic landmark.

7.1.2.7 Ordinary repair or maintenance which does not involve changes in architectural and historical value, style, general design, arrangement, texture, material or color are exempt from the provisions of this article.

SECTION 8. PROCEDURE FOR REQUESTING PUBLIC OWNERSHIP OR CONTROL OF HISTORIC LANDMARKS

If the Commission finds that a designated historic landmark cannot be preserved without acquisition, the Commission shall recommend to the City Council that it be acquired by a gift, devise, or purchase by funds donated by individuals or public groups.

SECTION 9. APPEAL PROCEDURE

Any applicant or interested person aggrieved by a ruling of the Landmark Commission, may, within sixty (60) days of the date of the notice of the Landmark Commission's decision, appeal to the City Council.

SECTION 10. PENALTY

It shall be unlawful to alter, demolish, or remove any exterior feature of any designated historic landmark or structure within a Historic District, or to change materially by additions, reconstruction, alteration or maintenance the exterior of any designated historical landmark. Any person violating any provision of this ordinance shall be guilty of a misdemeanor and shall be subject to a fine not to exceed One Thousand Dollars ($1,000.00) for each offense, and each day or portion thereof that a violation continues shall be considered a separate offense.

In addition to other remedies, the City Administrator, or his duly authorized representative, may institute any appropriate action or proceedings to prevent such unlawful construction, restoration, demolition, razing or maintenance or to prevent any illegal act or business in or about such premises.

SECTION 11. TAX EXEMPTION

11.1 In accordance with the provisions of this ordinance and Section 11.24 of the Texas Tax Code, the owner(s) of a building, which is located within an historic district, which the City Council has designated as a historically significant site in need of tax relief to encourage its preservation, and has been substantially rehabilitated and/or restored as approved by the Landmark Commission, may apply to City Council for a tax exemption yearly. Upon approval by City Council, the assessed value of the property for ad valorem taxation shall be equal to the assessed value prior to the substantial rehabilitation or restoration, for a period not to exceed ten (10) consecutive years.

This exemption shall begin on the first day of the first tax year after the completion of the preservation.

The deed, grant, sale, bequest, devise or other transfer of ownership of the property shall not cause the exemption provided herein to terminate.

SECTION 11.2 APPLICATION

Applications for an historic structure preservation tax exemption shall be filed with the Landmark Commission. The Landmark Commission, following approval, shall forward the application to the City of Boerne City Council. Each application shall be signed and sworn to by the owner of the property and shall:

11.2.1 State the legal description of the property proposed for exemption;

11.2.2 Include an affidavit by the owner describing the historic significance of the structure in need of tax relief;

11.2.3 Include a final complete set of plans for the historic structure's restoration or rehabilitation;

11.2.4 Include a statement of costs for the restoration or rehabilitation work;

11.2.5 Include a projection of the estimated construction, time and predicted completion date of the historic restoration or rehabilitation;

11.2.6 Authorize the members of the Landmark Commission, the City Tax Assessor/Collector, and other City officials to visit and inspect the property as necessary to certify that the property in question is in substantial need of restoration or rehabilitation;

11.2.7 Include a detailed statement of the proposed use for the property; and

11.2.8 Provide any additional information to the Landmark Commission which the owner deems relevant or useful such as the history of the structure or proposed access to the structure by the public.

SECTION 11.3 EXEMPTION REMOVAL

The Landmark Commission shall inspect annually all those properties which have been granted tax exemptions. If, in the opinion of the Landmark Commission, said property is no

longer being maintained in an acceptable state of repair, the Landmark Commission shall contact the owner(s) of the property and discuss their concerns with them.

Following such discussion, the Landmark Commission shall make a report to the City Council either requesting that the tax exemption be terminated on the last day of the tax year for that parcel, or outlining the steps the property owner shall take to bring the property up to acceptable standards.

City Council, upon receipt of the report of the Landmark Commission, may remove the tax exemption if it deems such action appropriate.

SECTION 12. DEMOLITION OF HAZARDOUS STRUCTURES

Nothing in this ordinance shall apply to or in any way prevent the demolition of any building which is an imminent danger to public health and safety and which cannot be made reasonably safe according to the opinion of the City Building Inspector.

SECTION 13. EFFECT OF PARTIAL INVALIDITY

If any part of any provision of this Ordinance shall be declared void or unconstitutional by a court having competent jurisdiction, such declaration shall in no way affect the remaining parts or provisions, and they shall remain in full force and effect.

SECTION 14. EFFECTIVE DATE

This Ordinance will take effect ten (10) days after final passage and publication as required by law.

READ AND APPROVED on first reading this, the 11th day of JUNE, 1991.

READ, APPROVED AND ADOPTED on second reading this, the 25th day of JUNE, 1991.

APPROVED:

/s/ Patrick Heath
Mayor

ATTEST:

/s/ Bernell Norton
City Secretary

Supreme Court, U.
FILED
AUG 26 1996

(2)

No. 95-2074

In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF BOERNE, TEXAS, PETITIONER

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993 violates principles of federalism, the separation of powers, or the Establishment Clause, and, if not, whether *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), should be reconsidered.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2074

CITY OF BOERNE, TEXAS, PETITIONER

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 73 F.3d 1352. The opinion of the district court (Pet. App. 24a-29a) is reported at 877 F. Supp. 355.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. A petition for rehearing was denied on March 28, 1996. Pet. App. 30a-31a. The petition for a writ of certiorari was filed on June 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, establishes, as a matter of statutory right, heightened protection for the exercise of religion.[1] Central to RFRA is the requirement that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. Under the Act, the "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4).

RFRA's mandate applies "to all Federal and State law, and the implementation of that law, whether statutory or otherwise," adopted either before or after RFRA. 42 U.S.C. 2000bb-3(a). RFRA identifies the "government[s]" subject to its terms as any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or subdivision of a State." 42 U.S.C. 2000bb-2(1). A person whose rights under RFRA have been violated "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c).

The legislative history indicates that, in passing the legislation, Congress relied upon its authority under Section 5 of the Fourteenth Amendment and

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[1] The text of RFRA is reproduced at Pet. App. 39a-42a.

the Necessary and Proper Clause, Art. I, § 8, Cl. 18. S. Rep. No. 111, 103d Cong., 1st Sess. 13-14 (1993).

b. Congress enacted RFRA following this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not require Oregon to exempt from its general criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id.* at 877-882. Under *Smith*, such generally applicable laws may be applied to religious exercises even when not supported by a compelling government interest. *Id.* at 884-889.

In enacting RFRA, Congress expressed concern about the impact of the *Smith* decision on the exercise of religion. After holding hearings and collecting evidence,[2] Congress concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. 2000bb(a)(2). The compelling interest test used by courts prior to *Smith*, Congress concluded, "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). Accordingly, Congress enacted RFRA for the purpose of restoring, as a matter of

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[2] See *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(b)(1).

c. Prior to RFRA's passage, Congress specifically considered the question of its constitutional authority to enact the legislation. The House Report stated that, under Section 5 of the Fourteenth Amendment, Congress

> has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself.

H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 & n.21 (1993) (citing cases). The House Report concluded that, "in passing [RFRA], Congress appropriately creates a statutory right within the perimeter of its power." *Ibid.* The Senate Report echoed the House Report's view. Because RFRA "is clearly designed to implement the free exercise clause—to protect religious liberty and to eliminate laws 'prohibiting the free exercise' of religion," the Senate Report concluded, "[RFRA] falls squarely within Congress' section 5 enforcement power." S. Rep. No. 111, *supra*, at 14.

In enacting RFRA, Congress repeatedly disavowed any effort to review or reverse this Court's decision in *Smith* or in any other case. S. Rep. No. 111, *supra*, at 9, 14 n.43 (RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action."); H.R. Rep. No. 88, *supra*, at 7,

15 n.3; 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (Rep. Hyde). Congress stated that it was creating a new statutory right of free exercise in light of this Court's delineation of the First Amendment's scope. S. Rep. No. 111, *supra*, at 14 n.43; H.R. Rep. No. 88, *supra*, at 9, 15 n.3.

2. a. P.F. Flores is the Archbishop of San Antonio, Texas. Saint Peter Catholic Church in Boerne, Texas, is within the San Antonio Archdiocese. Because of substantial population growth, the Church is no longer able to accommodate all of its parishioners who seek to attend its regular services. According to the complaint, the Church will be unable to accomplish its mission or survive as a parish church unless it expands. In 1990, Archbishop Flores authorized enlargement of the Church to accommodate all those seeking to worship there and to conform the sanctuary's layout to current liturgical requirements of the Catholic Church. Pet. App. 2a.

The City subsequently designated a Historic District in Boerne that includes a portion of the Church. (The Church itself is not a historic landmark.) In 1994, the City denied Archbishop Flores' application for a permit to expand the Church, because of its location within the Historic District. Pet. App. 2a.

b. Archbishop Flores filed suit challenging the City's denial of the construction permit. Archbishop Flores alleged that the City's action violated RFRA. The complaint also includes claims under the First, Fifth, and Fourteenth Amendments to the federal Constitution and under the Texas Constitution.[3] The

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[3] Adjudication of these other claims has been stayed by the district court pending the outcome of the Fifth Circuit litigation.

City defended in part on the ground that RFRA is unconstitutional. Pet. App. 2a-3a. The United States then intervened for the limited purpose of defending the constitutionality of RFRA. *Id.* at 26a.

The district court subsequently issued an order declaring RFRA unconstitutional on separation of powers grounds. Specifically, the district court ruled that, through RFRA, Congress usurped the Supreme Court's exclusive authority to interpret the Constitution by attempting to overturn this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, *supra*. The district court also questioned Congress's authority to enact RFRA under Section 5 of the Fourteenth Amendment. The district court did not address the underlying merits of Archbishop Flores' RFRA claim. The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b) and stayed all further proceedings pending disposition of the appeal. Pet. App. 26a-29a.

c. Archbishop Flores and the United States filed timely petitions for interlocutory review and notices of appeal. Construing the district court's order as a certification under Federal Rule of Civil Procedure 54(b), the Fifth Circuit granted permission to appeal. On January 23, 1996, the Fifth Circuit issued a decision reversing the district court and upholding the constitutionality of RFRA. Pet. App. 1a-23a. The Fifth Circuit concluded that, in enacting RFRA, Congress properly exercised its power under Section 5 of the Fourteenth Amendment. The court rejected the City's attempt to confine Congress's Section 5 power to measures that enforce only the Fourteenth Amendment's Equal Protection Clause. *Id.* at 10a-11a. The court of appeals then concluded that RFRA is plainly

adapted to enforcing the Fourteenth Amendment's free exercise and equal protection guarantees because RFRA (i) deters governmental violations of the free exercise clause, (ii) limits laws that have the effect of impeding religious exercise, and (iii) protects and equalizes the free exercise rights of minority religions. *Id.* at 12a-15a.

The court of appeals also rejected the City's facial separation of powers, Tenth Amendment, and Establishment Clause challenges to RFRA. The separation of powers argument, the court concluded, "rests on the mistaken assumption that *Smith* describes not only how little the Government *must* accommodate religion but also how much it *may* accommodate it." Pet. App. 17a. With respect to the Tenth Amendment, the court of appeals noted that principles of federalism are attenuated when Congress acts under Section 5. The court further held that "RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation." *Id.* at 22a. Finally, the court rejected the City's facial Establishment Clause challenge, noting that "RFRA no more advances religion than any other legislatively mandated accommodation of the exercise of religion." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals upholding the constitutionality of the Religious Freedom Restoration Act of 1993 is consistent with the ruling of every other appellate court, and virtually every trial court, that has considered the issue. The court of appeals' decision, moreover, is correct and does not conflict with any decision of this Court. Further review is therefore not warranted.

1. Every appellate court that has considered the issue has upheld the constitutionality of RFRA. *Sasnett* v. *Sullivan*, No. 95-3924, 1996 WL 432348 (7th Cir. Aug. 2, 1996) (RFRA properly enacted under Section 5; separation of powers, Tenth Amendment, and Establishment Clause challenges rejected); *EEOC* v. *Catholic Univ. of America*, 83 F.3d 455, 469-470 (D.C. Cir. 1996) (upholding RFRA as applied to the federal government against separation of powers and Establishment Clause challenges); *South Jersey Catholic Sch. Teachers Ass'n* v. *St. Teresa of the Infant Jesus Church Elementary Sch.*, 675 A.2d 1155, 1166-1167 (N.J. Super. Ct. App. Div. 1996) (upholding Congress's power to enact RFRA under Section 5 of the Fourteenth Amendment and rejecting separation of powers challenges); *Wisconsin* v. *Miller*, 538 N.W.2d 573, 577 (Wis. Ct. App. 1995) (acknowledging Congress's power to enact RFRA under Section 5 and rejecting separation of powers and Tenth Amendment objections to the Act), aff'd, 549 N.W.2d 235 (Wis. 1996). See also *United States* v. *Bauer*, 84 F.3d 1549, 1558-1559 (9th Cir. 1996) (in RFRA case, acknowledging Congress's power and prior practice of protecting "the great guarantees of the Bill of Rights," including First Amendment rights); *Smith* v. *Fair Employment & Housing Comm'n*, 913 P.2d 909, 955-956 (Cal. 1996) (Kennard, J., concurring and dissenting), petition for cert. pending, No. 96-31 (filed July 8, 1996); *id.* at 969 (Baxter, J., concurring and dissenting).[4]

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[4] The issue of RFRA's constitutionality has also been briefed in two pending Fourth Circuit cases: *Davis* v. *Angelone*, Nos. 95-8579, 96-6176, and *Brock* v. *Carroll*, No. 95-7081. It is unclear whether the Fourth Circuit will resolve the question

Virtually every district court that has considered the question has also sustained RFRA. *Lindsey* v. *Vaughn*, No. 93-2030 (E.D. Pa. Aug. 15, 1996), slip op. 3-5; *Abordo* v. *Hawaii*, 902 F. Supp. 1220, 1230-1234 (D. Haw. 1995); *Muslim* v. *Frame*, 891 F. Supp. 226, 229 n.2 (E.D. Pa. 1995) (dicta); *Belgard* v. *Hawaii*, 883 F. Supp. 510, 513-517 (D. Haw. 1995); *Phipps* v. *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *Campos* v. *Coughlin*, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994) (dicta).[5]

2. Review is also inappropriate because the decision below is interlocutory in nature. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture

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of RFRA's constitutionality in either case. Previously, in *Cochran* v. *Morris*, 73 F.3d 1310 (1996) (en banc), the Fourth Circuit entertained briefing and oral argument on RFRA's constitutionality, but ultimately disposed of the case without reaching the issue. *Id.* at 1317 n.3.

[5] The only outstanding decisions declaring RFRA unconstitutional are two trial court decisions that have not yet been subjected to appellate review. *Keeler* v. *Mayor & City Council of Cumberland*, No. S96-167, 1996 WL 311701 (D. Md. June 10, 1996), petition for interlocutory appeal denied, No. 96-565 (4th Cir. July 17, 1996); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995), appeal dismissed as moot, No. MT-95-2336 (9th Cir. Bankr. App. Panel May 7, 1996), appeal pending, No. 96-35801 (9th Cir.). In addition, two judges have written separate opinions concluding that RFRA is unconstitutional. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1557-1570 (8th Cir. 1996) (McMillian, J., dissenting); *Smith* v. *Fair Employment & Housing Comm'n*, 913 P.2d at 937-939 (Mosk, J., concurring). Those opinions were not joined by any other judges, and Justice Mosk's concurrence was written without the benefit of briefing or oral argument on the question.

of the litigation) with *United States* v. *Virginia*, 116 S. Ct. 2264, 2272 (1996) (review granted after final judgment). The question of RFRA's constitutionality arose in the district court on a motion to dismiss. The district court certified the issue for interlocutory appeal under 28 U.S.C. 1292(b) and stayed the case pending resolution of the appeal. Both Archbishop Flores and the United States filed petitions for interlocutory appeal. Although the district court had not entered a partial final judgment under Federal Rule of Civil Procedure 54(b), the Fifth Circuit entertained the appeal as a final judgment under Rule 54(b), rather than under Section 1292(b). In its decision reversing the district court, however, the court of appeals remanded the case for further proceedings, which would include adjudication of the merits of the Archbishop's claims and/or resolution of the other constitutional claims presented in the case.

The question of RFRA's constitutionality is thus not yet "ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Either a rejection of the Archbishop's RFRA claim on its merits or a ruling in the Archbishop's favor on one of the other claims presented would make it unnecessary to decide the question of RFRA's constitutionality. See *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

The City fails to demonstrate (see Pet. 10-11 & n.12) that any serious or irreparable harm will ensue from a denial of review. The litigation and judicial resources that will be devoted to trying this case in the district court on the merits do not constitute the type of harm calling for this Court's review. Cf. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. Nor does the fact that States and localities must comply with the law unless it is held to be unconstitutional warrant review. Such compliance is commonplace in a system that presumes the constitutionality of legislation and obliges parties to obey the law unless and until a court invalidates it.

Granting review on this record would, on the other hand, require the Court to address the constitutionality of federal legislation in a wholly abstract context. Review of the Act's constitutionality would be more appropriate in a case where RFRA has been found applicable to particular facts, or where the statute has been invalidated below, so that the constitutional issues can be presented in a crystallized and concrete form.

3. The court of appeals' decision in this case is, moreover, correct and consistent with this Court's precedent. Congress enacted RFRA pursuant to its authority under Section 5 of the Fourteenth Amendment. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section 5 is thus a positive grant of legislative power to Congress, in addition to the authority already embodied in Article I. *Ex parte Virginia*, 100 U.S. 339, 345 (1879); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.). This Court has recognized that, with regard to legislation enacted pursuant to

Section 5, "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

When exercising its legislative power under Section 5, Congress may go beyond outlawing conduct that the Fourteenth Amendment itself proscribes. Congress may legislate prophylactically and regulate state conduct that substantially burdens or threatens to impede the exercise and enjoyment of constitutionally protected activity. *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986) (Congress may ban voting practices that have a discriminatory effect, even though the Fourteenth and Fifteenth Amendments proscribe only intentional discrimination); *City of Rome* v. *United States*, 446 U.S. 156, 175-178 (1980); *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-653 (1966) (in enforcing the Fourteenth Amendment, Congress may outlaw literacy tests that have been upheld against constitutional attack).

A statute constitutes "appropriate legislation" to enforce the Fourteenth Amendment if it (i) is "an enactment to enforce" a right guaranteed by the Fourteenth Amendment, (ii) is "plainly adapted to that end," and (iii) does not transgress any other constitutional limitations. *Morgan*, 384 U.S. at 651. The court of appeals below ruled that RFRA is an "enactment to enforce" the right to free exercise of religion guaranteed by the Fourteenth Amendment and is "plainly adapted" to that end. Pet. App. 10a-15a.[6] The City has not sought review of those aspects

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[6] Specifically, the court of appeals found that RFRA promotes the purposes of the Fourteenth Amendment's free

of the court of appeals' decision. The City seeks this Court's review only of the question whether RFRA transgresses other constitutional limitations: in particular, principles of federalism, the separation of powers, and the Establishment Clause. Each of these arguments is foreclosed by precedent.

a. As the court of appeals recognized, this Court has repeatedly rejected Tenth Amendment or "federalism" challenges to legislation enacted pursuant to Congress's Section 5 power.[7] The Civil War Amendments "'were specifically designed as an expansion of federal power and an intrusion on state sovereignty.' * * * By its terms, the Fourteenth Amendment contemplates interference with state authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (quoting *City of Rome*, 446 U.S. at 179); see also *Ex parte Virginia*, 100 U.S. at 346. States have no special

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exercise and equal protection guarantees. RFRA's heightened scrutiny of laws that substantially burden religious exercise reduces governmental interference with religious duties and, by requiring some measure of accommodation for religious needs, lowers barriers to free exercise. RFRA also preserves for religious minorities, who may be unable to obtain legislative exemptions, the same free exercise rights enjoyed by more established religions. Additionally, RFRA ensures that States cannot conceal intentional discrimination against religious groups through the use of facially neutral laws. Pet. App. 10a-15a.

[7] See, e.g., *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980).

authority to regulate religion or religious exercise; nor does the Constitution grant localities exclusive jurisdiction over zoning matters. Cf. *Oregon* v. *Mitchell*, 400 U.S. 112, 124-131 (1970) (opinion of Black, J.) (Congress may not prescribe the voting age for state and local elections because Article I, Section 2, expressly reserves that power to the States). RFRA implicates only the general reserve of state authority that is fully subject to Congress's Section 5 power. See *Gregory*, 501 U.S. at 468-470; *EEOC* v. *Wyoming*, 460 U.S. 226, 239-242 (1983); *Ex parte Virginia*, 100 U.S. at 346. Accordingly, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments." *City of Rome*, 446 U.S. at 179.[8]

Furthermore, because the United States is equally subject to RFRA, there can be no argument that the

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[8] The City's reliance (Pet. 24-25) on *New York* v. *United States*, 505 U.S. 144 (1992), is misplaced. *New York* addressed Congress's power to legislate under the Commerce Clause. The decision thus has nothing to do with established principles concerning the general inapplicability of Tenth Amendment objections to Congress's use of its Section 5 powers. Further, RFRA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176. States have not been conscripted to administer a federal program; they need not undertake or refrain from undertaking any particular regulatory activity. RFRA simply provides that whatever actions are undertaken must be accomplished consistently with federal norms, just as States currently must conduct their affairs within the constraints of Title VII of the Civil Rights Act of 1964. See *EEOC*, 460 U.S. at 236-243 & n.18.

federal government has aggrandized its own power at the expense of the States. Rather, RFRA

> limit[s] the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. * * * [T]his promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

Pointer v. *Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

For these reasons, the City's request (Pet. 27) that this case be held pending disposition of *Printz* v. *United States*, cert. granted, 116 S. Ct. 2521 (1996) (No. 95-1478), should be rejected. *Printz* addresses the relationship between the Commerce Clause power and the Tenth Amendment.

b. The court of appeals' ruling that RFRA does not violate the separation of powers also comports with this Court's precedent. The City's argument that RFRA violates the separation of powers doctrine proceeds from the assumption that Congress, through RFRA, has sought to supplant this Court as the final arbiter of the Constitution's requirements. In fact, Congress expressly disavowed any attempt independently to interpret the First Amendment.[9] As it has repeatedly done in other contexts, Congress bridged the gap between the tolerance for religion that the

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[9] See S. Rep. No. 111, *supra*, at 14 n.43; H.R. Rep. No. 88, *supra*, at 15 n.3; 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (Rep. Hyde); see also *Canedy* v. *Boardman*, No. 95-1931, 1996 WL 405430, at *3 (7th Cir. July 19, 1996) ("RFRA does nothing to change the nature of constitutional rights as defined by the courts.").

First Amendment compels, and the protection of religious exercise that Section 5 of the Fourteenth Amendment permits. Congress's prescription of a statutory legal standard for courts to apply in evaluating statutory claims for relief transgresses no constitutional boundary between the legislative and judicial branches. That conclusion is not altered because Congress here chose to enforce the free exercise guarantee by restoring, as a matter of *statutory* right, a standard of governmental scrutiny that this Court has ruled is not *constitutionally* compelled. Title VII of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have the same effect. Compare *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) (opinion of Stewart, J.) (Constitution does not proscribe voting practices that have only a discriminatory effect) with *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986) and *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (Voting Rights Act's statutory restoration of discriminatory effects test upheld); compare *Washington* v. *Davis*, 426 U.S. 229 (1976) (discriminatory impact of employment practices not constitutionally proscribed) with *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) and *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (statutory imposition of discriminatory impact test upheld).[10]

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[10] At its core, the City's separation of powers argument proceeds from the mistaken assumption that this Court in *Smith* articulated not just a constitutional floor, but also a ceiling on how much government can accommodate religion. But *Smith* expressly acknowledged the role of legislatures in "affirmatively foster[ing]" the free exercise of religion through accommodation. 494 U.S. at 890. That is all RFRA does, and it does so in a manner that treats all religions equally. Cf. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct.

c. The City's argument (Pet. 19-20) that RFRA runs afoul of the Establishment Clause because it accommodates religious, but not secular, beliefs disregards this Court's precedent. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). RFRA's alleviation of significant or "substantial" governmental interference with religious exercise is a permissible secular purpose. Congress did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Id.* at 335; cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.) (tax subsidy invalidated because it "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"). Exemptions from otherwise generally applicable statutes do not constitute impermissible governmental facilitation of religion, as long as the government neither adds to nor subsidizes the propagation of the religious message. See *Amos*, 483 U.S. at 338 (accommodation statute need not "come packaged with benefits to secular entities").

2481, 2492-2493 (1994) (noting concerns that may be raised by sect-specific accommodations). Furthermore, the fact that, in the course of enacting RFRA, some members of Congress criticized this Court's decision in *Smith* has no bearing on whether the separation of powers doctrine has been violated. See *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1562 (11th Cir. 1984) ("congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate"). A difference in the conclusions reached by this Court, about what the Constitution compels, and by Congress, about what society as a practical matter requires to protect constitutional rights, is precisely what the separation of powers doctrine in general, and Section 5 in particular, envision.

4. The City asks this Court to overrule "in part" *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Any such departure from the doctrine of *stare decisis* "demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). The City offers no such "special justification."

a. The contention (see Pet. 23) that Congress must make specific factual findings before legislating has been repeatedly rejected by this Court both in Section 5 cases and elsewhere. *United States* v. *Lopez*, 115 S. Ct. 1624, 1631 (1995) ("Congress need [not] make particularized findings in order to legislate.") (quoting *Perez* v. *United States*, 402 U.S. 146, 156 (1971)); *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986) (Title VII's religious accommodation requirement "was added to the 1972 amendments on the floor of the Senate with little discussion"); *Fullilove*, 448 U.S. at 458-462 (opinion of Burger, C.J.). In any event, ample fact findings underlay Congress's enactment of RFRA. See S. Rep. No. 111, *supra*; H.R. Rep. No. 88, *supra*.[11]

b. The argument (Pet. 21-23) that "state recalcitrance to the constitutional standard" is a necessary

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[11] The City's suggestion that Congress must specifically find that each particular state action covered by a statute burdens constitutional rights before exercising its Section 5 power would apparently require the invalidation of laws such as Title VII (see *Fitzpatrick*, 427 U.S. at 453-456) and the Voting Rights Act, both of which (like RFRA) impose general standards to govern state conduct. Furthermore, the argument that Congress cannot enact flexible and calibrated standards that take into account States' countervailing interests, but must instead flatly prohibit certain state conduct in order to exercise its Section 5 power, stands traditional notions of federalism on their head.

prerequisite for Section 5 legislation equally lacks foundation in this Court's precedent. See *Oregon* v. *Mitchell*, 400 U.S. at 133-134 (opinion of Black, J.); *id.* at 147 (opinion of Douglas, J.); *id.* at 216-217 (opinion of Harlan, J.); *id.* at 233-236 (opinion of Brennan, White, & Marshall, JJ.); *id.* at 283-284 (opinion of Stewart & Blackmun, JJ., & Burger, C.J.) (nationwide ban on literacy tests upheld, despite arguments that evidence of illicit use of tests was geographically limited); *City of Rome*, 446 U.S. at 172 (application of voting preclearance requirements upheld even though no discriminatory purpose underlay adoption of city's electoral system); see also *id.* at 190 (Stevens, J., concurring) ("the fact that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant"); compare *Fitzpatrick* v. *Bitzer*, *supra* (Congress's extension in 1972 of Title VII's gender discrimination provision to States upheld) with *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.) (Court first expressly rules that Equal Protection Clause imposes heightened scrutiny on gender discrimination claims). In any event, RFRA's legislative history chronicles both historical and contemporary instances of governmental persecution and discrimination against religious adherents and religious minorities.[12]

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[12] See, *e.g.*, H.R. Rep. No. 88, *supra*, at 6; S. Rep. No. 111, *supra*, at 8; *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 5-7, 27, 30-39, 63-64, 69-71, 74, 129 (1992); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 11, 23-25, 104, 107-108, 157-158, 326, 332-338, 398, 406-408 (1992).

c. The City invites this Court (Pet. 23-25) to revisit *Morgan*'s "ratchet theory." The City defines the "ratchet theory" as Congress's power under Section 5 to expand a constitutional right by enacting a statute. But Congress expressly and repeatedly disavowed any intention to change the scope of the First Amendment by enacting RFRA. See, *e.g.*, S. Rep. No. 111, *supra*, at 9, 14 n.43 (RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action."); H.R. Rep. No. 88, *supra*, at 7, 15 n.3; 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (Rep. Hyde). Rather, Congress made clear that it was simply creating a new statutory right of free exercise in light of this Court's delineation of the First Amendment's scope. S. Rep. No. 111, *supra*, at 14 n.43; H.R. Rep. No. 88, *supra*, at 9, 15 n.3.[13]

d. Finally, the City seeks (Pet. 25-26) a ruling from this Court that Section 5's enforcement provisions apply only to the Equal Protection Clause. This Court, however, has long recognized that Congress's Section 5 power extends beyond enforcement

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[13] If, on the other hand, the City means to argue that Congress may not enact statutory supplements to constitutional rights, then the City is asking this Court to reverse the entire history of Section 5 jurisprudence and to reduce Congress's power under the Fourteenth Amendment "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Morgan*, 384 U.S. at 648-649.

solely of the Equal Protection Clause.[14] In any event, as the court of appeals found (Pet. App. 14a-15a), RFRA enforces the Equal Protection Clause's guarantee of religious equality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1996

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[14] See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 789 (1966) ("We have no doubt of 'the power of Congress to enforce * * * every right guaranteed by the Due Process Clause of the Fourteenth Amendment.'") (quoting *United States* v. *Williams*, 341 U.S. 70, 72 (1951) (opinion of Frankfurter, J.)); see also *Maher* v. *Gagne*, 448 U.S. 122, 130-133 (1980) (upholding congressional power to authorize attorney's fees against States for statutory violations brought in conjunction with due process and equal protection claims); *Hutto* v. *Finney*, 437 U.S. 678, 693-695 (1978) (upholding congressional enforcement of the Eighth Amendment, as incorporated through the Due Process Clause); *Oregon* v. *Mitchell*, 400 U.S. at 285-287 (opinion of Stewart & Blackmun, JJ., & Burger, C.J.) (Section 5 power can enforce due process right to travel between States); *id.* at 236-239 (opinion of Brennan, White, & Marshall, JJ.) (Section 5 power available to enforce ban on residency requirements); *id.* at 147-150 (opinion of Douglas, J.) (ban on residency requirements proper exercise of Section 5 power).

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

(5)

No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

CITY OF BOERNE, TEXAS
Petitioner,
vs.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT OF RESPONDENT FLORES IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), is a facially valid exercise of Congressional power to enforce the Fourteenth Amendment.

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INTRODUCTORY STATEMENT

Respondent Flores joins petitioner in urging the Court to grant certiorari in this case.

The reason for reviewing this case is not any urgent need to relieve state and local governments of the rather modest burden of making occasional exceptions, where possible, to accommodate the religious faith and practice of the American people. The real problem is that nearly three years after Congress passed the Religious Freedom Restoration Act by overwhelming margins, vociferous and persistent claims that it is unconstitutional have created uncertainty that hampers enforcement of the Act in this case and in many other cases. The arguments on each side are fully developed and ripe for review by this Court. Only a decision by this Court can resolve the uncertainty and clear the way to compliance with the Act either generally or in this case.

STATEMENT OF THE CASE

1. The Underlying Dispute. This case involves the right of access to the Roman Catholic Mass in St. Peter Church in Boerne, Texas. The church was built in 1923 and is now far too small to seat the parishioners who wish to attend scheduled services. Comp. par. 25 at R.546; *see* Stip. par. o at R.590. The City has refused every request for a permit to enlarge the church building to make it adequate to the parish's needs. Stip. par. v, y, cc at R.591. An undisputed affidavit from the pastor states that would-be worshipers have regularly been "turned away for lack of standing room." R.255-56.[1]

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[1] Pages from the Record are cited as R. The Petition for Writ of Certiorari is cited as Pet.; the Appendices to that Petition are cited as Pet.

The church is not an historic landmark. Stip. par. t at R.590. However, the front facade of the church is now located within the historic district authorized by Ordinance 91-05 and created by Ordinance 91-15 of the City of Boerne. The City created this historic district after the church leadership had already begun active planning to expand the church building. Comp. par. 9 at R.541-42; Stip. par. h at R.590. But the church leadership relied on the stated boundaries of the historic district, which ran through the church immediately behind the front facade. Comp. par. 11 at R.542; *see* Stip. par. s at R.590. The church did not oppose inclusion of the front facade in the historic district; instead, the church leaders designed a new church structure that would preserve the front facade. Comp. par. 12 at R.543. But the City refused to issue a building permit for any plan that included demolition of that part of the church outside the historic district, Comp. par. 13-15 at R.543-44, and three years later, in Ordinance 94-17, the City amended the district's boundaries to include the entire church. Stip. par. gg at R.592. All further negotiations have been fruitless. Stip. par. cc at R.591.

The pastor's undisputed affidavit states that St. Peter Church has 2,170 members, that it expects to have 2,750 members by the year 2000, that it can seat only 230 of these members at a time, and that 40 to 60 more than that regularly attempt to attend 11:00 Mass on Sunday. R.255-56. Some of these people stand in the aisles; some are turned away. *Id.* The record does not indicate how many are turned away at Christmas and Easter, or how many gave up trying to attend. An undisputed affidavit from the

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App. Except as otherwise noted in text, all facts are taken from a stipulation of the Archbishop and the City (Exhibit 5-PTO, Stipulated Facts, cited as Stip.), or from the Second Amended Complaint (cited as Comp.). The Complaint is taken as true on this petition, which grows out of a judgment dismissing plaintiff's claim on the pleadings.

Archbishop states that he cannot relieve the situation by assigning an additional priest. R.252. Although the record does not reflect the fact, the church is now celebrating Mass in an ill-suited secular auditorium.

2. The Litigation Below. Respondent, the Roman Catholic Archbishop of San Antonio, owns the real property of St. Peter Church. He filed this action seeking relief under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994) (RFRA or the Act). He also asserted state and federal constitutional claims not at issue in this Court. The City challenged the constitutionality of RFRA, and the United States intervened as a defendant. Pet. App. 32a. The District Court held that RFRA is unconstitutional, *id.* at 28a, and certified this judgment for interlocutory appeal of a controlling question of law under 28 U.S.C. §1292(b) (1994). Pet. App. 28a-29a.

Because the District Court's judgment was in effect a dismissal of the Archbishop's RFRA claim, the Court of Appeals treated it as a final judgment on a severable issue. Pursuant to longstanding circuit precedent, the Court of Appeals treated the certification under §1292(b) as more appropriately a certification under Fed. R. Civ. Proc. 54(b). *See* Pet. App. 3a.[2] On the merits, the Court of Appeals reversed.

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[2] Out of an abundance of caution, the Archbishop and the United States each filed a petition for leave to appeal under §1292(b) and a notice of appeal under Rule 54(b). Pet. App. 3a. The order granting appeal under Rule 54(b) is not reprinted in Pet. App. To comply with Supreme Court Rule 14(*i*)(ii), that order is reprinted as an Appendix to this Statement.

3. The Statute at Issue. The President signed the Religious Freedom Restoration Act on November 16, 1993. It had passed the House of Representatives by unanimous voice vote, 139 Cong. Rec. H8715 (daily ed. Nov. 3, 1993), and the Senate by a vote of 97-3, 139 Cong. Rec. S14470 (daily ed. Oct. 27, 1993).

RFRA creates a statutory right to the free exercise of religion. The central provision of the Act provides:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b) (1994).

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. §2000bb-1(c) (1994).

This *statutory* right is in aid of the narrower *constitutional* right to the free exercise of religion. Under this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Constitution permits neutral and generally applicable laws to be applied in ways that suppress religious practices. The government need not justify the resulting burden on religion. *Id.* at 885. But for laws that are not neutral and generally applicable -- most obviously, for laws that deliberately target religion or laws that, when read in light of related legislation, are revealed to overtly discriminate against religion -- the resulting burdens on

religion must be justified by a compelling interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-40, 546-47 (1993); *Smith*, 494 U.S. at 877-79.

RFRA creates a statutory right that is more protective of religious exercise. Under RFRA, the compelling interest test applies to any substantial burden on religious exercise, "even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a) (1994). The religious claimant need not prove overt or intentional discrimination. Thus, the essential difference between the constitutional and statutory standards is in the threshold showing required to shift the burden of justification to the government. It is a variation on the familiar difference between intention and effect. Any substantial burden on religion requires justification under RFRA; only overt or deliberate discrimination requires justification under the Constitution.

REASONS FOR GRANTING THE WRIT

I. The Issue Is Important, and an Act of Congress Cannot Be Effectively Enforced Until This Issue Is Resolved.

A. The Public's Interest in Resolution of This Issue.

Any serious question about the constitutionality of an Act of Congress deserves review by this Court. This Court frequently reviews the constitutionality of federal statutes without waiting for a split in the appellate courts or for an appellate decision invalidating the statute. For example, there appears to have been no split of appellate authority on the constitutionality of the federal statutes at issue in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*,

116 S.Ct. 2374 (1996); *Felker v. Turpin*, 116 S.Ct. 2333 (1996); or *Colorado Republican Campaign Comm. v. Federal Election Comm'n*, 116 S.Ct. 2309 (1996).

The constitutional question here has become serious, even though we believe the City's arguments are quite implausible, because these arguments are so persistently and vociferously asserted that they significantly hamper enforcement of the Act. Every appellate court to consider a constitutional attack on RFRA has upheld the statute, yet the frequency of constitutional attacks is actually increasing as knowledge of the possibility of these attacks spreads among the bar.

It is difficult to settle cases until these constitutional doubts are resolved, because attorneys for litigants resisting enforcement believe that the claim might go away if RFRA is held unconstitutional. It is nearly as difficult to try cases, because the issues to be tried depend on resolution of the constitutional question. If RFRA is constitutional, religious claimants must prove a substantial burden on the exercise of their religion; if RFRA is unconstitutional, religious claimants must prove overt discrimination or anti-religious motive, or they must fit themselves into one of *Smith*'s numerous exceptions, or they must prove other claims unrelated to religious liberty. Resourceful lawyers may offer evidence under any of these theories, but the litigation takes a very different course depending on which is emphasized.

The constitutionality of RFRA is important to a substantial number of cases, although the City exaggerates the number of decided cases to date, and it certainly exaggerates the burden of compliance on government agencies. Government can still regulate or even suppress religious practices when there is compelling reason to do so; what RFRA takes away is government's right to burden the

exercise of religion for reasons that are merely rational or desirable but not essential.

The City's claim of more than two hundred cases appears to be based on how many times the phrase "Religious Freedom Restoration Act" appeared in a Westlaw search. This method includes every casual reference to the Act, including all cases that quote the attorneys' fees statute, 42 U.S.C. §1988(b) (1994), whether or not they have anything to do with religion; all cases that say, "No issue is presented under the Religious Freedom Restoration Act;" and so on. With or without any correction for the City's exaggerated count, the frequency of RFRA disputes is infinitesimal compared to the untold millions of times each year that individuals and organizations comply with government regulations or have those regulations enforced against them. But each meritorious RFRA claim is of vital importance to the claimant. Each meritorious RFRA claim is brought on behalf of one or more Americans whose exercise of religion has been suppressed, burdened, or penalized without sufficient cause.

Each of these claims is important to the religious believers affected, and each of these claims is hampered by the current uncertainty about the constitutionality of the Act. Whatever disagreements there may be about the most desirable level and most appropriate mechanisms of legal protection for religious liberty, there is agreement among all three branches of government, the Framers of the Constitution, and the traditions of the American people, that the exercise of religion is of profound importance to each individual and religious group. This Court should grant certiorari to remove the constitutional doubt about Congress's effort to protect this important right.

B. The Archbishop's Interest in Resolution of This Issue.

Because of the procedural posture of this case, denial of certiorari would not reduce the uncertainty even for Archbishop Flores and St. Peter Church. The Petition for Writ of Certiorari demonstrates the City's unwillingness to accept the judgment of the Court of Appeals, and the City could raise the issue again on remand.

The District Court dismissed the RFRA claim; the Court of Appeals reversed that judgment and reinstated the RFRA claim for trial. Trial of this case would proceed under the cloud of continuing constitutional challenge to the Act in other cases, and with the knowledge that if this Court were to invalidate RFRA in some other case, before exhaustion of all appeals from a second final judgment in this case on remand, the new decision could still be applied to this case. Any such new decision by this Court would override law of the case in the lower courts, *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992), and in any event, the City could present its constitutional challenge on a second petition for certiorari after trial and a second appeal, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 881 n.1 (1990).

Because the City apparently believes that there is a substantial chance that this Court will ultimately invalidate RFRA, there would be little prospect of settlement after a denial of certiorari at this stage. Because of the possibility that a decision invalidating RFRA might yet be applied to this case, the District Judge and the parties would be forced to give full attention to the other counts of the complaint, which allege claims under the Free Exercise Clause, the Free Speech and Assembly Clauses, the Takings Clause, the Due Process and Equal Protection Clauses, and the Texas Constitution. Comp. par. 32-52 at R.549-57.

Thus, the salutary purposes of appeals under Rule 54(b) and §1292(b) would be wholly lost to the parties and to the courts below if certiorari is denied. The appeal to the Court of Appeals would have accomplished nothing by way of simplifying the litigation on remand. We obviously do not suggest that every appeal under Rule 54(b) or §1292(b) deserves review by this Court. But here, the issue is recurring and sufficiently important that this Court is likely to review it sooner or later, the City will have later opportunities to apply any change in law to this case, and the City has demonstrated its willingness to bring the issue to this Court. This combination of circumstances defines a narrow class of cases in which denial of certiorari would render Rule 54(b) and §1292(b) illusory.[3]

If the constitutionality of RFRA were not deserving of this Court's review, then the needs of the litigants and the courts below would not be a reason to grant certiorari. But if, as we believe, the *issue* is deserving of this Court's

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[3] Where the underlying issue deserves review by this Court, the need for further proceedings on remand is of course no barrier to review. For opinions reviewing on certiorari questions presented pursuant to certification under §1292(b), *see, e.g., United States v. Winstar Corp.*, 116 S.Ct. 2432, 2447 (1996); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S.Ct. 619, 622-23 (1996); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2325-26 (1995). For cases where, as here, the District Court entered a final judgment on a severable issue pursuant to Rule 54(b), the Court of Appeals reversed and remanded, and this Court granted certiorari without awaiting the remand, see *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 263-64 (1992); *Mireles v. Waco*, 502 U.S. 9, 11 (1991). The same procedural posture is presented in any case in which a Court of Appeals reverses and remands a final judgment of a District Court, whether or not the final judgment was on a severable issue. Grants of certiorari in this situation are routine. *See, e.g., Board of County Comm'rs, Wabaunsee County v. Umbehr*, 116 S.Ct. 2342, 2346 (1996); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 116 S.Ct. 2309, 2314 (1996); *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2249-50 (1996).

review eventually, then the needs of the litigants and the courts below are a reason to review the issue in *this case*, and not wait for some other case. It is important to the Archbishop, to the City, and to the District Judge, to get this issue resolved before trial.

II. The Arguments on Both Sides Have Been Adequately Developed; There Is No Need to Await a Split of Appellate Authority.

There is no split of appellate authority. Five appellate courts have now upheld the Act; no appellate court has struck it down. But the arguments against the constitutionality of RFRA are fully developed in separate opinions by individual appellate judges, in a minority of district court and bankruptcy court opinions, and in a large law review literature. We briefly review the contributions to this debate.

Judge Higginbotham's careful, persuasive, and unanimous opinion for the Court of Appeals rejects each of the constitutional challenges presented here. *Flores v. City of Boerne*, 73 F.3d 1352, *reh'g en banc denied without a poll of the judges*, 83 F.3d 421 (5th Cir. 1996).

Judge Posner's unanimous opinion for the Seventh Circuit also rejects each of the constitutional challenges presented here. *Sasnett v. Sullivan*, 1996 Westlaw 432348 (7th Cir., Aug. 2, 1996).

Judge Buckley's opinion for the D.C. Circuit upholds the Act as applied to federal law. *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996). That opinion rejects two of the arguments presented here -- that RFRA violates the Establishment Clause and that it violates separation of powers. The questions relating to Section 5 of the Fourteenth Amendment were not presented in that case.

The Wisconsin Appellate Court held that Congress has power to enact RFRA under Section 5 of the Fourteenth Amendment. *State v. Miller*, 538 N.W.2d 573, 577 (Wis. App. 1995), *aff'd on other grounds*, 549 N.W.2d 235 (Wis. 1996) (upholding the religious liberty claim under the state constitution).

The Appellate Division of the New Jersey Superior Court unanimously upheld RFRA in *South Jersey Catholic School Teachers Ass'n v. St. Teresa of the Infant Jesus Elem. School*, 675 A.2d 1155, 1167 (N.J. Super. App. Div. 1996), *petition for certification pending on other grounds* (N.J., No. 42523).

Notwithstanding this unanimity of result at the appellate level, the arguments for the unconstitutionality of RFRA are fully developed elsewhere. For separate opinions by appellate judges who would invalidate the Act, *see Hamilton v. Schriro*, 74 F.3d 1545, 1561-70 (8th Cir. 1996) (McMillian, J., dissenting), *petition for cert. filed* (No. 96-5016); *Smith v. Fair Empl. & Hsg. Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring), *petition for cert. filed*, 65 U.S.L.W. 3095 (July 8, 1996) (No. 96-31); *State v. Miller*, 538 N.W.2d 573, 580-81 (Wis. App. 1995) (Sundby, J., dissenting). The petitions for certiorari in *Hamilton* and *Smith* do not present the question whether RFRA is constitutional.

Two district judges and one bankruptcy judge have published opinions invalidating the Act. *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996), *interlocutory appeal denied* (4th Cir. No. 96-564 and 96-565); *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996); *In re Tessier*, 190 B.R. 396

(Bankr. D. Mon. 1995), *appeal dismissed as moot* (Bankr. 9th Cir. No. MT-95-2336), *appeal pending*.[4]

A larger number of district court judges have published opinions upholding the Act. This respondent is aware of *Abordo v. Hawaii*, 902 F. Supp. 1220, 1229-34 (D. Haw. 1995) (Kay, J.); *Sasnett v. Sullivan*, 891 F. Supp. 1305, 1315-21 (W.D. Wis. 1995), *aff'd*, 1996 Westlaw 432348 (7th Cir., Aug. 2, 1996); *Belgard v. Hawaii*, 883 F. Supp. 510, 512-17 (D. Haw. 1995) (Gillmor, J.); and *Campos v. Coughlin*, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994) (dictum). The two judges from the District of Hawaii reached the same conclusion independently; *Abordo* cites *Belgard* only in passing.

There is a large law review literature on both sides of the question; most of these articles are collected in the Petition for Certiorari at 12-14 n.14. Two omissions are Douglas Laycock, *Congress, RFRA, and the Ratchet*, 56 Mont. L. Rev. 145 (1995), and Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221.

In short, the issue is fully joined. RFRA's opponents have not won a case at the appellate level, but they have been diligent and creative, and there is nothing to be gained by awaiting further developments in the lower courts.

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[4] In *Tessier*, the bankrupt debtors who invoked the Act have not appealed, and the case appears to be moot as to them. The United States has appealed the judgment that RFRA is unconstitutional, first to the Bankruptcy Appellate Panel, and now to the Court of Appeals. If and when this case arrives in this Court, it will come with a significant threshold issue of justiciability.

III. The Issue Is Squarely and Cleanly Presented Here.

There are no jurisdictional, procedural, or non-constitutional substantive issues in this case that could interfere with a square decision on the important issue presented. The District Court's judgment was a final judgment dismissing the RFRA count on the ground that the statute is unconstitutional. Only that issue is presented on appeal.

For reasons that inhere in the procedure of federal and most state courts, most cases will not present the constitutional issue so cleanly. Defendants typically challenge the constitutionality of RFRA on a motion to dismiss or motion for summary judgment. A trial judge who upholds the Act and denies defendant's motion has not entered a final judgment. Nor has he done anything surprising, given the presumption of constitutionality that attaches to an Act of Congress, so he is unlikely to certify the question for interlocutory appeal. Indeed, we are aware of no other case in which both the district court and the court of appeals have permitted an appeal before entry of a final judgment on all the issues in the case.

A trial judge who upholds the Act will then go on to consider factual and statutory grounds for decision of the RFRA count, and sometimes, alternate grounds for relief. This produces a mix of issues in the appellate court, all subject to the rule that constitutional grounds for decision should be avoided where possible. Constitutional challenges to RFRA thus may complicate and prolong litigation and hamper enforcement of the Act, and then disappear no matter which side wins on other grounds. Thus, in *State v. Miller*, the constitutional issue was decided in the Court of Appeals, but not in the Wisconsin Supreme Court, where the religious claimant prevailed on state constitutional grounds. *State v. Miller*, 538 N.W.2d 573 (Wis. App. 1995), *aff'd on*

other grounds, 549 N.W.2d 235 (Wis. 1996). In *South Jersey Catholic School Teachers Ass'n v. St. Teresa of the Infant Jesus Elem. School*, 675 A.2d 1155, 1167 (N.J. Super. App. Div. 1996), the constitutional issue was decided and the Act upheld, but the court went on to rule against the religious claimant on other grounds. The constitutional issue is not presented by either side in the Petition for Certification now pending in the New Jersey Supreme Court (No. 42523).

The constitutional issue has been argued but not decided in many cases. This respondent is aware of reported opinions in *Thiry v. Carlson*, 78 F.3d 1491, 1495 n.1 (10th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (June 14, 1996) (No. 95-2022); *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996), *petition for cert. filed* (No. 96-5016); *see id.* at 1558-59 (McMillian, J., dissenting); *Cochran v. Morris*, 73 F.3d 1310, 1317 n.3 (4th Cir. 1996); *see id.* at 1321 (Michael, J., dissenting); *Haff v. Cooke*, 923 F. Supp. 1104, 1113 (E.D. Wis. 1996); *Muhammad v. City of New York*, 904 F. Supp. 161, 166 & n.1 (S.D.N.Y. 1995); *Snyder v. Murray City Corp.*, 902 F. Supp. 1444, 1447, 1450 n.12 (D. Utah 1995); *Reimann v. Murphy*, 897 F. Supp. 398, 401 (E.D. Wis. 1995); *George v. Sullivan*, 896 F. Supp. 895, 897-98 (W.D. Wis. 1995); and *Van Dyke v. Washington*, 896 F. Supp. 183, 190 (C.D. Ill. 1995). We are also aware of unreported opinions in which the issue was argued but not decided.

We do not mean to exaggerate the point; sooner or later the issue will again be squarely presented to this Court. But in the meantime, continuing constitutional doubts will hamper enforcement of the Act. The difficulty of enforcement will aggravate the burdens on the religious liberty of those who present claims under the Act.

IV. The Issue Will Be Better Briefed If It Is Not Combined With Novel Issues of Statutory Interpretation In the Same Case.

The constitutional issues will be better briefed and better argued in a case that presents no other issues. The attacks on RFRA present multiple issues for briefing in one case, even if the case is confined to the constitutionality of the Act. Thus the City claims that the Act violates the Tenth Amendment, the Establishment Clause, and the separation of powers, and that it exceeds Congressional power under Section 5 of the Fourteenth Amendment. This range of issues is typical of the litigating position of attorneys attacking the Act. This Court would not be well served by considering the constitutional issues in a case in which novel and important issues of statutory interpretation were presented for the first time.

Such issues of statutory interpretation are now before the Court or on their way to the Court. The petition in No. 96-31, *Smith v. Fair Empl. & Hsg. Comm'n*, presents an important question about the meaning of "substantial burden." The petition in No. 96-5016, *Hamilton v. Schriro*, presents an important question about the burdens of production and persuasion in litigation over compelling interests. Similarly important questions of statutory interpretation are pending in the lower courts. For example, multiple courts have been required to hold that the Act protects religiously motivated conduct, and not just conduct that is religiously compelled. *See In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996); *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995), *aff'd*, 1996 Westlaw 432348 (7th Cir., Aug. 2, 1996); *Muslim v. Frame*, 891 F. Supp. 226, 231 (E.D. Pa. 1995), *modified on other grounds*, 897 F. Supp. 215 (E.D. Pa. 1995). Proper resolution of issues such as these could set the statute on a course toward

workable and effective enforcement; improper resolution could make the statute a dead letter, or less likely, unworkably extreme. Issues of constitutionality and of statutory interpretation are each sufficiently important to deserve full and undivided briefing.

V. This Case Should *Not* Be Held for *Printz v. United States*.

The petition prays that the writ should be granted, or in the alternative, that the case be held "for determination of *Printz v. United States*, No. 95-1478, *cert. granted*," 116 S.Ct. 2521 (1996). Pet. at 27. This alternative prayer for relief relates to the City's argument that RFRA somehow violates the constitutional rule against "commandeering" state governments. *Printz* presents the question whether the rule against commandeering state regulatory processes extends to federal delegation of ministerial tasks to state employees.

It is clear that no issue of commandeering is presented in this case. The Court's commandeering doctrine forbids the United States to specify a particular policy solution that can be implemented only through affirmative governmental regulation, and then commandeer state government to enact the regulations and implement the policy. "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). But:

> The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes.

Id.

There may be cases where this difference is fine, but this is not one of them. RFRA requires no affirmative act by any government or government official; it requires only that certain religious practices be left *un*regulated. State and local governments are free to enact any policy they desire and to enforce it against all those persons whose objection is not religiously motivated -- typically an overwhelming majority of the population. With respect to those few persons whose religious practice is substantially burdened by a government policy, the governmental unit has a wide range of options. It can repeal the burdensome policy as to everyone; it can narrow the policy as to everyone but in a way that excludes the religious act from the policy's scope; it can retain the policy without change and exempt the burdened religious exercise; it can retain the policy unchanged and without exemption if the burden on religion serves a compelling interest by the least restrictive means; or it can craft some combination of these alternatives. These choices are left entirely to the state or local government.

Far from mandating affirmative regulatory acts, RFRA merely pre-empts regulation in limited areas and with respect to limited groups. To the extent that it can be said to mandate anything, it mandates the absence of regulation. There is no plausible claim that it commandeers state regulatory processes. Judge Posner properly gave this argument short shrift in the Seventh Circuit case: "It [RFRA] does not enlist state officials as federal functionaries. It does not make the states dance to a federal tune . . ." *Sasnett v. Sullivan*, 1996 Westlaw 432348 at *4 (7th Cir., Aug. 2, 1996).

We also note that the Court has developed its modern commandeering doctrine in the context of Article I powers, relying on the view that Article I empowers Congress to regulate individuals, not governments. *New York v. United States*, 505 U.S. 144, 162-66 (1992). The Fourteenth

Amendment is of course an explicit limitation on state power, and Section 5 of that Amendment is a plenary grant of power to Congress to enforce the Amendment. *See, e.g., Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1125, 1128 (1996) (distinguishing the Fourteenth Amendment from Article I, and recognizing that the Fourteenth Amendment "fundamentally altered the balance of state and federal power" (*id.* at 1125)); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"); *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 347-48 (1879) (holding that the Fourteenth Amendment overrode a nineteenth century version of the commandeering doctrine).

Printz v. United States is therefore doubly inapposite: because this case is not plausibly about commandeering, and because *Printz* is not about Congressional action to enforce the Fourteenth Amendment. The Court should decide this case on its own merits, and not hold it for *Printz*.

VI. A Brief Response to The Petition's Comments on the Merits.

Much of the petition is devoted to preliminary argument on the merits, which of course are not yet at issue. Most of the erroneous claims in the petition can be corrected simply by reading Judge Higginbotham's opinion for the Court of Appeals. But the impression that the petition attempts to create should not go unremarked. RFRA is not different in kind from many other acts to enforce the Reconstruction Amendments.

Congress has not attempted to dictate to the courts the meaning of constitutional protection for the free exercise of religion; it is undisputed that *Employment Div. v. Smith*, 494

U.S. 872 (1990), remains the law of the Free Exercise Clause until and unless this Court changes its interpretation. Rather, Congress has created a new statutory protection for free exercise. The statutory text is not even ambiguous with respect to whether it creates a statutory right or ineffectually attempts to amend the Constitution without invoking the procedures of Article V. Even if the text were ambiguous, standard canons of interpretation would preclude the City's attempt to interpret the Act in a way that would make it ineffectual and unconstitutional.

With respect to state and local governments, Congressional power to enact RFRA is found in Section 5 of the Fourteenth Amendment, which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." A long and unbroken line of interpretation in this Court holds that Congressional power to enforce constitutional amendments includes power to enact prophylactic rules that go beyond what the judiciary would enjoin on its own interpretation of the Amendment. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) ("The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.") (plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justice White); *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (upholding Congressional power to remedy discriminatory effects in government contracting, without proof of discriminatory purpose and without formal findings) (plurality opinion by Chief Justice Burger, joined by Justices Powell and White); *id.* at 499-502, 507-10 (Powell, J., concurring); *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980) (upholding Congressional power to ban voting practices with discriminatory effects, without proof of discriminatory purpose); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (upholding Congressional power to

ban private discrimination as a means of enforcing the Thirteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968) ("Congress has power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." (*id.* at 440)); *Katzenbach v. Morgan*, 384 U.S. 641, 648-56 (1966) (upholding the Voting Rights Act's ban on English language literacy tests for voting, as applied to voters educated in American-flag Spanish-language schools, without proof of discriminatory purpose); *South Carolina v. Katzenbach*, 383 U.S. 301, 325-37 (1966) (upholding the Voting Rights Act's broad array of intrusive prophylactic means to secure voting rights); *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924) (holding that Congress could ban sales of alcohol for medicinal purposes as a prophylactic means to enforce Eighteenth Amendment ban on sales for beverage purposes); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) ("It is the power of Congress which has been enlarged" by the Fourteenth Amendment).

We have saved for special mention one case in this line, because it is misstated in the Petition for Certiorari. Pet. at 24. The case is *Oregon v. Mitchell*, 400 U.S. 112 (1970), which unanimously reaffirmed Congressional power to go far beyond judicial interpretation of the Constitution in the Voting Rights Act Amendments of 1970. *See id.* at 131-34 (opinion of Justice Black, upholding nationwide ban on literacy tests without proof of discriminatory purpose); *id.* at 144-47 (opinion of Justice Douglas) (same, noting that Congress "need not make findings as to the incidence of literacy" (*id.* at 147)); *id.* at 216-17 (opinion of Justice Harlan) (same, relying on Congressional power to enforce the Fifteenth Amendment, "[d]espite the lack of evidence of specific instances of discriminatory effect or application" (*id.* at 216)); *id.* at 231-36 (opinion of Justices Brennan, White, and Marshall) (same, relying on Congressional power to ban

practices with discriminatory effects); *id.* at 282-84 (opinion of Justice Stewart, joined by Chief Justice Burger and Justice Blackmun) (same, joining Justice Black's opinion on this issue, and noting that "Congress may paint with a much broader brush than may this Court" (*id.* at 284)). *See also Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (noting that in *Oregon v. Mitchell*, "[t]he Court was unanimous, albeit in separate opinions," in holding that Congress could prohibit voting tests with "discriminatory effects only") (plurality opinion by Chief Justice Burger, joined by Justices Powell and White).

In the cases cited so far, the Court upheld Congressional power to ban state practices that the Court itself was not prepared to hold unconstitutional. The Constitution as judicially interpreted neither authorized nor forbad these practices. It is perhaps even more striking that Congress has power under Section 5 to override constitutional provisions that limit remedies against state governments. Congress may exercise this power in aid of constitutional rights, whether or not plaintiff proves a constitutional violation that courts would recognize. *See Maher v. Gagne*, 448 U.S. 122, 130-33 (1980) (holding that Congress can authorize attorneys' fees against state officials who would be immune under judicial interpretation of the Eleventh Amendment, following settlement of statutory claim pendent to a substantial constitutional claim, without proof of constitutional violation that would be recognized by courts); *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978) (holding that Congress can authorize attorneys' fees against state officials who would be immune under judicial interpretation of the Eleventh Amendment, in suit to enforce incorporated rights, and describing Congressional power to enforce the Fourteenth Amendment as "plenary" (*id.* at 693, 698-99 n.31)); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress can impose monetary liability on state officials who would be immune under judicial interpretation of the

Eleventh Amendment). This line of cases was most recently reaffirmed in *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1125, 1128 (1996).

In still other cases where Congressional efforts to enforce the Reconstruction Amendments have gone beyond what this Court would require by judicial interpretation, this Court has enforced the statutes without questioning their constitutionality. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75 (1989) (reaffirming *Jones v. Alfred H. Mayer Co.*, without reconsidering the constitutional question); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (enforcing the religious accommodation provisions of Title VII against local government); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (enforcing the Voting Rights Act Amendments of 1982); *Arizona Governing Comm'n v. Norris*, 463 U.S. 1073 (1983) (enforcing the sex discrimination provisions of Title VII against state insurance and pension plans); *Connecticut v. Teal*, 457 U.S. 440 (1982) (enforcing the disparate impact provisions of Title VII against state government without proof of discriminatory purpose); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (enforcing the sex discrimination provisions of Title VII against municipal insurance and pension plans); *see also Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084 (5th Cir. 1981) (enforcing the Pregnancy Discrimination Act against local government).

In short, "Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned." *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984). It is part of the warp and woof of our law. The City must show that RFRA is somehow uniquely different from all these other laws that go beyond judicial interpretations of the Amendments. The City's vague claims of what is unique about RFRA amount to little more than that the City doesn't

like what Congress did or how Congress went about it. But how and when to exercise this prophylactic enforcement power is exclusively committed to Congress, and the standard of judicial review is the broad rational basis test of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (quoting *McCulloch*); *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924) (citing *McCulloch*); *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879) (paraphrasing *McCulloch* without citation).

This does not mean that the Congressional enforcement power is a blank check. As with any other source of Congressional authority, Congress has no power to violate any constitutional right adjudicated by the courts. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). The restrictions on racial preferences announced in recent decisions go to this limitation on Section 5 power; to the extent that whites have judicially enforceable constitutional rights to be free of affirmative action or race-based districting, Congress cannot reduce or limit those rights. *See, e.g., Bush v. Vera*, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2111 (1995).

Thus, a law prohibiting or restricting the free exercise of religion would not be a law to enforce religious liberty. An application of RFRA that violates the Establishment Clause, if any such application ever arises, would be unconstitutional. But it is frivolous to claim that RFRA generally or on its face violates the Establishment Clause. RFRA merely exempts religiously motivated conduct from burdensome regulation. This Court has unanimously upheld such exemptions against Establishment Clause attack, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327

(1987), and it affirmatively invited such exemptions in *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

Second, Congressional power under Section 5 is subject to other express allocations of power in the Constitution. This is why the Court invalidated a law granting eighteen-year-old citizens the right to vote in state elections. *Oregon v. Mitchell*, 400 U.S. 112, 119-30 (1970) (opinion of Justice Black); *id.* at 152-213 (opinion of Justice Harlan); *id.* at 293-96 (opinion of Justice Stewart, joined by Chief Justice Burger and Justice Blackmun). Four of these Justices relied on the express recognition of state voting rules in Article I, Section 2, and Justice Harlan relied on what he considered to be the clear intent of the Framers to similar effect.

RFRA raises no issue under this limit on Section 5 power. The Constitution does not recognize or preserve any specific state power to burden or regulate religion. The state regulatory powers affected by RFRA are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

Third, Congress may not assert its Section 5 powers as a sham to achieve ends unrelated to the Fourteenth Amendment. Congress must act to protect values that the Fourteenth Amendment also protects. Some Justices have suggested that Congress has no Section 5 power to forbid discrimination on the basis of a classification that has never received any constitutional protection by judicial interpretation. *EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Chief Justice Burger, dissenting, joined by then Justice Rehnquist and Justices Powell and O'Connor). The same four Justices suggested that Congress has no Section 5 power to forbid practices that it authorizes the federal government to engage in, because that authorization would imply that Congress does not really think the practices must be banned to enforce constitutional rights. *Id.* But these

Justices reaffirmed Congressional power "to enact legislation that prohibits conduct not in itself unconstitutional," either "to guard against encroachment of guaranteed rights or to rectify past discrimination" or to invalidate state laws that are "too intrusive on federal rights." *Id.* at 261-62.

RFRA raises no plausible issue concerning its connection to the Fourteenth Amendment, whatever test of nexus the Court might ultimately adopt. RFRA applies to federal law as well as state law, and it protects only conduct that is the exercise of religion within the meaning of the Constitution as interpreted by the judiciary. 42 U.S.C. §2000bb-2(4) (1994). RFRA unambiguously protects constitutional values; indeed, it is entirely confined to conduct that is constitutionally protected. Only the extent of the protection has been increased.

The City errs in arguing that this independent Congressional power to enforce the Fourteenth Amendment is somehow at odds with separation of powers. Rather, it is part of the genius of separation of powers. Liberty is most secure when all three branches have independent power to protect it; this is why Congress can expand but not contract the scope of Fourteenth Amendment liberties. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). The Framers of the Reconstruction Amendments deliberately created independent enforcement power both in Congress and the courts to reduce the risk that the Amendments would fail to achieve their purpose. That risk was real; the severity of the risk was most obviously revealed by the long period of Jim Crow.

Each branch brings different institutional strengths to the protection of liberty. *Employment Div. v. Smith*, 494 U.S. 872 (1990), is in part about the institutional limitations of the judiciary: that a religious "exemption is permitted, or even that it is desirable, is not to say . . . that the

appropriate occasions for its creation can be discerned by the courts." *Id.* at 890. But legislatures have their own institutional limitations, especially their inability to protect "those religious practices that are not widely engaged in." *Id.* By creating judicially enforceable statutory rights, Congress can call on powers of the judiciary that the Court feared to invoke on its own, and because the rights are statutory, Congress retains political responsibility and the capacity to respond if judicial interpretation imposes costs that are politically unacceptable. The resulting collaboration between the branches provides a stronger protection for liberty than either branch could provide alone. There is nothing anomalous about this; this is separation of powers at its best.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 26, 1996

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
F I L E D
May 9 1995

CHARLES R. FULBRUGE III
CLERK

No. 95-00067
USDC No. SA-94-CA-0421

P.F. FLORES, ARCHBISHOP
OF SAN ANTONIO,

Plaintiff-Petitioner,

and

UNITED STATES OF AMERICA,

Movant-Petitioner,

versus

CITY OF BOERNE,

Defendant-Respondent.

Petitions for Leave to Appeal
an Interlocutory Order

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

BY THE COURT:

ORDER
No. 95-00067

When a district court certifies an order pursuant to 28 U.S.C. § 1292(b) in which a Fed. R. Civ. P. 54(b) certification is more appropriate, we view the certification as brought pursuant to Rule 54(b). See DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1032 (5th Cir. 1982). By holding the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb through 2000bb-4, unconstitutional, the district court effectively eliminated the first cause of action of P.F. Flores, the Archbishop of San Antonio, Texas.

"It is settled that Rule 54(b) is limited to orders that would be 'final' if entered in a simple single-claim, two-party case." DeMelo, 677 F.2d at 1032. "[W]hen the facts give rise to more than one legal right or cause of action, and the two grounds of recovery are not mutually exclusive, there are multiple claims which can be separately appealed upon certification under Rule 54(b)." H & W Indus., Inc. v. Formosa Plastics Corp., USA, 860 F.2d 172, 176 (5th Cir. 1988). Therefore, IT IS ORDERED that the appeal is GRANTED pursuant to Rule 54(b).

IT IS FURTHER ORDERED that the expedited briefing schedule as proposed in the government's motion to amend briefing schedule filed April 14, 1995, is GRANTED. The request by the City of Boerne, Texas, for this court to certify to the Supreme Court the legal question of the constitutionality of RFRA, see 28 U.S.C. § 1254(2), will be considered by this court after the parties have filed their briefs.

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RHB 4/22/95 EJH 5/2 FPB 5-5-95

Supreme Court, U.S.
FILED
SEP 6 1996
CLERK

No. 95-2074

In The

Supreme Court of the United States

October Term, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

versus

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE AT THIS TIME

Petitioner, respondent Flores, amici representing sixteen States, the Texas Municipal League, the International Municipal Lawyers Association, and eight national religious organizations have argued forcefully in favor of granting certiorari in this case. In short, those who sit on opposite sides of the table under the regime of the Religious Freedom Restoration Act ("RFRA") have come together to urge this Court to clarify the prevailing confusion over its constitutionality.

By contrast, the Solicitor General has taken the unwarranted position that certiorari should not be granted on the issue of RFRA's constitutionality. Ignoring the indescribably vast range of circumstances in which RFRA has created uncertainty, which in turn has caused a certain escalation in litigation and settlement costs, the Solicitor General is content to let this unacceptable state of affairs continue into the indefinite future. With all due respect, the Solicitor General's arguments for deferring consideration of RFRA's constitutionality are not persuasive.

A. *Appellate Court Split.* Both the petition[1] and respondent Flores' response easily dispose of the Solicitor General's argument (S.G. at 8) that this Court should

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[1] Pages from the Petition for Writ of Certiorari are cited as P.W.; Respondent Flores' response is cited as F.R.; the Solicitor General's response is cited as S.G.; and the Coalition for the Free Exercise of Religion's Amicus Brief is cited as C.B.

deny certiorari because there is no split in the appellate courts as of yet. An appellate court split is not a jurisdictional requirement but rather a jurisprudential consideration. No salutary purpose is served by waiting for further appellate courts to assess RFRA's constitutionality. P.W. at 10-12; F.R. at 10-12.

B. *Finality.* The Solicitor General's argument that the decision below is "interlocutory in nature" and therefore unworthy of review is wholly without substance. S.G. at 9. As Judge Higginbotham characterized it, the district court entered "a partial final judgment under Fed. R. Civ. P. 54(b). . . . We [the Court of Appeals] have jurisdiction." P.W. at 3. That is more than sufficient for this Court.

Even if the decision below were not final, this Court could exercise jurisdiction over the case if it were so inclined. Supreme Court Rule 10 states: "Review on a writ of certiorari is not a matter of right, but of judicial discretion." A certiorari petition may even be granted when a case is pending in the court of appeals *before* judgment is entered. Sup. Ct. Rule 11.

Robert L. Stern and Eugene Gressman explain as follows: "Although . . . the Court ordinarily declines to exercise its discretionary certiorari jurisdiction to review judgments that are not final, the fact that the decision below lacks finality is no bar to review cases in the courts of appeals. . . . As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the Supreme Court has jurisdiction to take the case *whatever its status in the lower court.*"

Robert L. Stern & Eugene Gressman, *Supreme Court Practice* 40 (7th ed. 1993) (emphasis added). Given that the decision below was a final judgment on the issue of RFRA's constitutionality, and that a timely petition has been filed, there can be no question that this Court can and should grant certiorari in this case at this time.

C. *Record Below.* The Solicitor General argues that "[g]ranting review on this record would . . . require the Court to address the constitutionality of federal legislation in a wholly abstract context." S.G. at 11. As the arguments for granting certiorari in the petition, respondent Flores' response, and all of the *amici curiae* make absolutely clear, after almost three years in operation, there is nothing abstract about RFRA's impact or its constitutional parameters. Whatever record might be built is irrelevant to RFRA's constitutionality, which is determined solely by this Court's federalism, separation of powers, and Establishment Clause doctrines.

II. RFRA IS PATENTLY UNCONSTITUTIONAL AND THEREFORE SHOULD BE INVALIDATED SOONER RATHER THAN LATER

While a full-blown discussion of the merits is not appropriate at this stage, a brief reply to respondents' arguments on the merits makes clear the necessity of granting certiorari now to relieve state and local governments from RFRA's grasp.[2]

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[2] Amicus Coalition for the Free Exercise of Religion's misguided attempt to link the recent and tragic church bombings in this country with the City's negative determination

A. *Section 5 of the Fourteenth Amendment.* Respondent Flores mistakenly believes that labeling RFRA a "statutory" right rather than a constitutional right saves RFRA. F.R. at 4. Section 5 of the Fourteenth Amendment, the only possible source of constitutional authority for RFRA, does not authorize Congress to devise statutory rights wholly distinct from constitutional rights designated by this Court. To the contrary, the plain language of Section 5 gives Congress power to "enforce, by appropriate legislation, the provisions of *this article.*" P.W. at 38a (emphasis added). In other words, section 5 grants Congress the sole power to enforce *constitutional* guarantees, not the power to transform those guarantees under the guise of "statutory rights."

The Constitution protects religious adherents solely from discriminatory legislation burdening religious conduct. *Employment Division v. Smith,* 494 U.S. 872, 885 (1990). RFRA does not enforce that guarantee, but rather a much different proposition – one far removed from *Smith* and even this Court's pre-*Smith* jurisprudence. *Smith,* 494 U.S. at 885; P.W. at 15. RFRA invents a statutory right out of Congress's policy judgment that the Constitution does not go far enough now and has never

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pursuant to its democratically and legitimately enacted historical preservation rules reveals how crucial it is for this Court to take action at this time. The Coalition's contempt for democratically enacted law starkly reveals the extraordinary burdens RFRA places on elected officials attempting to serve the people. The City has never "deprive[d] the faithful of a house of prayer." C.B. at 8. Instead, it has asked, and failed to receive, cooperation from the Church in preserving its most beautiful and historical district.

gone far enough with respect to religious rights. P.W. at 5-7. Its goal is not to enforce the guarantees announced in *Smith* but rather to supplement them.

Respondents' attempt to shoehorn RFRA into the Voting Rights Act cases is similarly unavailing. F.R. at 19-23; S.G. at 12. The Voting Rights Act cases, which involved the enforcement of guarantees found in the Thirteenth, Fourteenth, and Fifteenth Amendments, are irrelevant. The plain language of the First Amendment, which begins with the phrase, "Congress shall make no law," is in sharp contrast to the expansive language of the Thirteenth Amendment and the more limited language of the Fourteenth and Fifteenth Amendments. Even cursory comparison of the language in the First, Thirteenth, Fourteenth, and Fifteenth Amendments makes crystal clear that Congress is on a considerably shorter leash with respect to First Amendment freedoms than it is with respect to rights against discrimination. As Leonard Levy has stated, "Black magic – not historical evidence, grammatical analysis, or logical deduction – black magic and only that can turn the First Amendment into a repository of government power. Plainly it limits power." Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 115 (1986). *See also Hutto v. Finney*, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting) ("[I]t is not at all clear to me that . . . Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.")

Even if Congress has some prophylactic power to enforce the Fourteenth Amendment's Equal Protection Clause in situations where the factual record plainly reveals state and local governments recalcitrant to the Constitution's demands, the First Amendment, *by its own terms,* discourages Congress from taking such an activist role with respect to First Amendment freedoms. Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act,* 48 Vand. L. Rev. 1539, 1582, 1595 (1995). The empirical necessity of prophylactic legislation in the Voting Rights Act cases is not duplicated in this circumstance. *See* P.W. at 22. *See also Sasnett v. Sullivan,* No. 95-3924, 1996 WL 432348 *3 (7th Cir. August 2, 1996) ("We are given some pause, . . . by the lack of a recent history of governmental discrimination against religious observance.")

Finally, it is undeniable that RFRA cannot be saved by labeling it after the fact as an anti-discrimination statute. S.G. at 21. RFRA goes considerably further, commanding the courts to employ strict scrutiny to ban substantial burdens on religion, whether discriminatory or not. *The Religious Freedom Restoration Act: Hearings Before the House Comm. on the Jud.,* 102d Cong., 2d Sess. 334-335, 337 (May 13-14, 1992) (emphasis added) (RFRA intended to protect mainstream as well as minority churches). Congress is fully capable of enacting laws banning discrimination against religion when it intends to do so. *See* 42 U.S.C. 2000e-2; *Estate of Thornton v. Caldor,* 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) (characterizing religious accommodation provisions as "anti-discrimination law" and "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause"). RFRA

itself makes clear its roots lie in the First Amendment and not the Equal Protection Clause. 42 U.S.C. § 2000bb-4.

B. *Separation of Powers.* Both respondents attempt to create the impression that RFRA is a run-of-the-mill congressional enactment that fits comfortably within this Court's jurisprudence. *See* S.G. at 11-13; F.R. at 19-24. To the contrary, RFRA stands in a disreputable class all by itself. As the opinion in *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591, 602 (D. Md. 1996), makes eloquently and abundantly clear, RFRA is an unprecedented grab for power by Congress in derogation of settled separation of powers principles. *See also Hamilton v. Schriro*, 74 F.3d 1545, 1570 (8th Cir. 1996) (McMillian, J., dissenting); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 139 (1996) ("Constitutional interpretation, which necessarily involves development of appropriate judicial standards of review, is at the core of the judicial process. . . . [W]hen Congress intrudes upon this core judicial function, directing the courts to abandon or adopt or restore a particular constitutional interpretation and to follow a standard of judicial review that Congress prefers, the result is a stark violation of the separation of powers doctrine . . . ").

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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Dated: September 5, 1996

Supreme Court, U.S.
FILED
AUG 28 1996
CLERK

No. 95-2074

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CITY OF BOERNE, Texas,
Petitioner,

VS.

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE TEXAS MUNICIPAL LEAGUE AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER CITY OF BOERNE, TEXAS

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INTEREST OF AMICI CURIAE

The Texas Municipal League is a non-profit association of over 1,000 Texas municipalities. Over 13,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The TML Legal Defense Program was established to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

The International Municipal Lawyers Association is a non-profit, nonpartisan organization, consisting of over 1,400 local governments and their attorneys. Member governments operate IMLA through their chief legal officers, variously called city or county attorneys, corporation counsel, city solicitors, law directors, and other titles. IMLA is dedicated to gathering and disseminating information on recent legal developments that affect municipalities. IMLA participates in a case in an *amicus* capacity when a majority of the Board of Directors determine that the case has nationwide impact and *amicus* support is warranted.

Amici Curiae the Texas Municipal League and the International Municipal Lawyers Association urge the Court to grant certiorari in this case to address a federal question of vital importance to cities and towns throughout this country.

Pursuant to the Rules of this Court, the parties have consented in writing to the filing of this *amicus curiae* brief.

At issue in this case is the constitutionality of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb *et. seq.* This act is an unprecedented attempt to modify the relationship between Congress and the Supreme Court in matters of their respective roles in enactment and interpretation of federal law. RFRA has imposed a new burden on municipal officials in that it applies a judicial standard that has never been required by the Supreme Court to all regulatory practices of state and local government. In RFRA, Congress has ordered state and local governments to accommodate every conceivable religious practice by a universal "least restrictive means" test. Cities enact and enforce a myriad of regulations that may include building codes, zoning laws, sexually oriented business standards, street and traffic regulations, health and safety ordinances, and many other types of rules and requirements. Congress has attempted, by the enactment of RFRA, to pass a universal statute imposing a rule for determining the constitutional validity of every local act and practice. Any complaint by churches, religious groups, or individuals claiming religious motivation is now subject to a new, extraordinarily high and burdensome federal standard that significantly restricts local autonomy.

Amici Curiae respectfully submit this brief in support of the Petitioner, the City of Boerne, Texas.

REASONS FOR GRANTING THE WRIT

A. The Validity of RFRA Raises A Federal Question of Vital Importance to Local Governments

The legislative history of the Religious Freedom Restoration Act reflects a clear congressional intent to ratchet up constitutional law under the First Amendment's Free Exercise Clause. *Employment Division v. Smith*, 494 U.S. 872 (1990), found that neutral, nondiscriminatory, local laws of general applicability which had an impact upon religious practice were not invalid under the Free Exercise Clause if there was a rational relationship to a legitimate state interest.

Under the Supreme Court's pre-Smith decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court announced broad protection for religiously motivated practices in the face of attempted governmental regulation, the lower courts struggled to strike the appropriate balance for claims of religious freedom in the context of general regulations. The analysis under *Sherbert* and *Yoder* established a two-part inquiry: first, the plaintiff had to establish that the

challenged government action imposed a significant burden on the free exercise of religion; second, if a burden was established, the government would then have to justify the imposition of that burden with a compelling state interest.

The court in *Smith* applied a broad principle that, for the most part, upheld the applicability of general, neutral regulations by abandoning the "compelling interest standard" and emphasized that "[t]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith* at 879 (quoting from *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). The Court concluded that general laws would be upheld against free exercise claims so long as they revealed a "rational relationship" to a legitimate state interest.

In 1993, Congress expressed its strong dissatisfaction with the Supreme Court's interpretation and as a direct result of the *Smith* opinion, it passed the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. Congressional motive in passing RFRA emphasized the legislative intent to institute, in statutory form, the infrequently used "compelling interest" test. The *Smith* court recognized that the "compelling interest" test was not utilized in free exercise cases beyond unemployment compensation cases. It is this standard,

however, that Congress mandated must be used in all instances.

RFRA creates considerable uncertainty, confusion, and liability for local officials. The burden has shifted to the government to justify its neutral and nondiscriminatory ordinances and actions with a compelling interest and to demonstrate that it does so by the least restrictive means. Municipalities are being compelled by a federal policy decision to accommodate religion beyond what is required in the Constitution. The effect upon cities is enormous because cities regulate in complex areas such as land use, health and safety, and many others that affect the daily activities of people and organizations. Expensive and time-consuming litigation resulting from claims under RFRA has been and will be borne by the cities who are already struggling to provide adequate levels of service and protection for their citizens.

In analyzing RFRA one commentator suggested:

> "If Congress has improved on the level of protection, it may in effect rob the examining courts of review of the constitutional issue. For instance, if a freedom of religion case were decided today, the lower court likely would not even need to reach the constitutional free exercise issue, because it

> could decide the case solely under RFRA. As freedom of religion cases start to swirl around RFRA's fixed aspect, the cases will become instances of interpretation of legislative intentions regarding liberty rather than interpretation of the Constitution itself."

Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L.Rev. 357 (1994).

The tendency toward this approach is evident in *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F.Supp. 538 (D.D.C. 1994), where a federal district court granted summary judgment to the plaintiffs and enjoined the application of the District of Columbia's zoning ordinance to a soup kitchen operated out of a church building. In this case, the church received a building permit for a new church; no reference was made in the application to the fact that the church planned to operate a feeding program for the homeless at the site. When the local neighborhood group learned of the church's plans, they informed the zoning officials. The zoning administrator then informed the church that they would need a variance on their permit to operate the feeding program. The church appealed the decision to the Zoning Board of Appeals, where relief was denied. The church later filed suit under the First Amendment and RFRA.

Although the court found that there was a violation of the First Amendment and RFRA, the opinion only discussed RFRA and the reasons for its enactment. The Court concluded in the decision that:

> "Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion. A city cannot use its zoning laws to regulate the way a particular religion offers its prayers or the way a religion celebrates its holidays." (Emphasis added.) *Id.* at 546.

Does this mean that once a church secures a building permit, it is then exempt from all land use and zoning requirements? Is the church exempt from requirements that city officials do not know are applicable when the building permit is issued? RFRA severely skews the Constitution's federalist balance between the states and the federal government, and violates the fundamental constitutional principle that divides power between the states and the federal government.

B. The Decision of the Fifth Court Upholding RFRA Conflicts with this Court's Federalism Doctrine

Congress has enacted legislation for many worthy programs to achieve notable goals, many of which may be shared by local officials, however its method of implementing some of these programs distorts the concept of federalism and infringes upon the Constitution's Tenth Amendment reservation of powers to the states and their political subdivisions. This Court, in recent years, has written on the principle of constitutional federalism and of the limitations on the federal government as stated in the Tenth Amendment. See, e.g., *Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114 (1996); *United States v. Lopez*, 115 S.Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

As this Court wrote in *New York* as follows:

> Much of the Constitution is concerned with setting forth the form of our government and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such

> measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crises of the day. . .(T)he Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions. *New York*, 505 U.S. at 187 and 162.

With RFRA, Congress has "instructed" states and local governments to review all legislative actions and activities - past, present, and future - for potential religious impact according to a specific standard that goes beyond what the Constitution itself requires. The burden is now on cities to assess whether a general regulation will have a substantial impact on any religious activity or organization. Cities must investigate and determine the least restrictive means for applying neutral and nondiscriminatory regulations - and they must do this, if they can, without violating the Establishment Clause or engaging in excessive entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). This process is mandatory because if a violation is found to occur, serious financial implications will result under 42 U.S.C. §§ 1983 and 1988. This new legislative prerequisite is being attached to every

form of local lawmaking, even areas traditionally left to state determination, like zoning or local land use issues. These requirements go well beyond the permissive limits of federalism.

CONCLUSION

For the foregoing reasons, the Amici Curiae respectfully request the Court to grant the petition for certiorari.

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No. 95-2074

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

In The

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P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE COALITION FOR THE FREE EXERCISE OF RELIGION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT FLORES

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STATEMENT OF INTEREST

The Coalition for the Free Exercise of Religion ("Coalition") is a group of over sixty religious and civil liberties organizations. The religious organizations in the Coalition represent the spectrum of religious diversity in America – Christians, Jews, Moslems, Native Americans, and Sikhs. The beliefs and practices of the religious communities in the Coalition are as diverse as the population of the Nation. The Coalition includes liberals and conservatives, and groups with world views as disparate as People for the American Way and Traditional Values Coalition. We disagree profoundly with one another about many of our most cherished traditions and beliefs. But one of the things that unifies all of us even more profoundly is our commitment to the protection of religious freedom as the first of our civil liberties.[1] We are united by the conviction that the protection of religious freedom is essential for the well-being of American society. The members of the Coalition participating in this brief are listed in Appendix A.

After this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Coalition sought from Congress remedial legislation that would secure religious freedom more adequately than under the standard

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[1] For an elegant statement of the primacy of the Religion Clauses of the First Amendment in our constitutional values, *see The Williamsburg Charter*, 8 J. LAW & RELIG. 5-22 (1990); for a study of the fragility of this constitutional value, *see* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

announced in *Smith*. We vigorously advocated the passage of the Religious Freedom Restoration Act ("RFRA"), and we act now in unison with the United States to support the constitutionality of RFRA whenever it is challenged by state and local authorities. The Coalition takes no position whatever on the merits or on any disputes between or among the parties. This brief addresses only the question whether RFRA is a legitimate exercise of congressional power.

The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

ARGUMENT

I. Religious Communities Cannot Maintain their Beliefs and Practices Free from Governmental Interference as Long as the Religious Freedom Restoration Act Remains Under a Constitutional Cloud.

This case comes to this Court in an unusual posture. Both petitioner and respondent urge the Court to grant certiorari, notwithstanding the fact the respondent prevailed in the court of appeals. By the same token, the Coalition fully supports the decision of the court of appeals, but also urges that the Court take this case. A prompt decision by this Court on the constitutionality of RFRA is crucial to protecting the religious freedom of all Americans and is fully warranted under the Court's standards for reviewing the constitutionality of acts of Congress.

On the day the Court decided to alter its free exercise jurisprudence in *Employment Division v. Smith*, 494 U.S. 872 (1990), it was immediately apparent to the members of this Coalition that we need greater protection for religious freedom than is provided by the rational basis standard announced by the Court in *Smith*. For one thing, *Smith* escalated the level of proof that we would have to demonstrate before receiving meaningful judicial protection from oppressive governmental regulation. Before *Smith* the government was required to demonstrate that its interest in a case involving deeply held religious beliefs and practices was truly compelling. As the Court announced in *Sherbert v. Verner*, 374 U.S. 398 (1963): "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious claimants], endangering paramount interests, give occasion for permissible limitation [on the free exercise of religion].'" 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). After *Smith* and before RFRA, religious claimants were required to demonstrate intentional or purposeful discrimination against a religious body before they could avail themselves of the compelling interest standard.

We appreciate the value of neutrality that the Court announced as central to free exercise jurisprudence in *Smith*; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But whether subtle or overt, inadvertent or intentional, violations of free exercise of religion can be masked under the category of facially neutral, generally applicable norms about public

health, welfare, or safety. For example, the general rule about availability of evidence in a criminal prosecution can be stated in a facially neutral way: the government is entitled to relevant and probative evidence. But since the earliest days of the Republic this broad rule has – for profound reasons of constitutional dimensions – admitted of a very important exception that protects against the use of the clergy as agents of the government. *See, e.g., Trammell v. United States*, 445 U.S. 40, 51 (1980) (dictum); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*, 103 Harv. L. Rev. 1409, 1410-12 (1990); Michael Plantamura, "Clergyman-Penitent Privilege," in Scott Stone and Ronald Liebman eds., *Testimonial Privileges* 359-76 (1983); James A. Serritella, "Confidentiality, the Church, and the Clergy," *Proceedings of the Forty-Eighth Annual Convention of the Canon Law Society of America* 83-93 (1986); and John C. Bush and William Harold Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law* (3d ed. 1989). Rejecting this long-standing and virtually universal practice of the states, the District Attorney of Lane County, Oregon – a jurisdiction that does not currently have a statute expressly protecting the confidentiality of communications between clergy and penitents – recently ordered the surreptitious recording of a sacramental confession by a penitent to a priest while the penitent was in custody. After vigorous protest by church leaders and civil libertarians, the prosecutor announced that he would not use the tape in court and that he would support legislation prohibiting the use of such evidence in his state. "Apology For Taping Inmate's Talk," *New York Times*, A-16, May 24, 1996. In the Oregon case the government yielded to

political pressure, but more frequently religious groups have little or no influence over elected officials accustomed to granting no exceptions to the uniform enforcement of the law.[2] Without RFRA, ancient religious practices long revered in this country can easily be eroded under the rubric of a generally applicable, facially neutral rule; and the level of generality of the governmental interest can easily be manipulated by an attorney for the government. The statutory safeguard afforded by RFRA is necessary, then, to avoid outrageous violations of free exercise such as that contemplated by the District Attorney in Oregon.

We struggle with the issue of the constitutionality of RFRA continuously. Because attorneys for state and local governments have subjected RFRA to relentless attack, we must litigate the constitutionality of this act of Congress over and over again. Every time we advise a client, whether a church or an individual believer, prudence dictates that we warn the client that the government may claim that RFRA is unconstitutional and that this claim has not yet been definitively resolved. The cloud that continues to hover over the constitutionality of RFRA thus impedes the effectiveness of an act of Congress that

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[2] The City of Boerne did not try to accommodate the religious needs of the Roman Catholic parishioners here, but forced Archbishop Flores into court to seek a judgment enforcing rights secured under RFRA. This governmental refusal to accommodate religious interests is reflected by governmental units in most of the cases litigated under RFRA, as well as in countless unreported cases in which members of the Coalition have given counsel to believers and their communities.

is entitled to a presumption of constitutionality, *United States v. National Dairy Products*, 372 U.S. 29, 32 (1963). Unless this cloud of unconstitutionality is removed from RFRA, the statute will not have the full operational effect designed by Congress, for the lower courts will follow the doctrine of *Ashwander v. TVA*, 297 U.S. 288 (1936) (to avoid a holding of unconstitutionality, an act of Congress may be construed narrowly), and will continue to produce cases such as *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 913 P. 2d 909 (1996), cert. pending, No. 96-31, and *Swanner v. Anchorage Equal Rights Commission*, 874 P. 2d 274 (Alaska 1994), cert. denied, 115 S. Ct. 460 (1995), where the statute has been mangled into unrecognizable forms.[3] Only this Court can resolve the lingering doubt about the constitutionality of RFRA and enable its full implementation to proceed. For these reasons we urge the Court to take this case and to sustain RFRA.

Both in our legislative efforts and in our current posture of litigation, we have remained united in a strong coalition to protect religious freedom. Our solidarity on

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[3] In *Smith v. Fair Employment and Housing Commission*, the California Supreme Court did not invalidate RFRA. Only one Justice was of that view, *Smith*, 12 Cal. 4th at 1189 (Mosk, J., concurring). Similarly, in *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court did not invalidate RFRA. But in both cases, the lower courts trivialized the religious interest and dramatically escalated the statutory threshold requirement of a showing of "burden" that a religious claimant must make in a RFRA case. *Smith*, 12 Cal. 4th at 1176; *Swanner*, 874 P. 2d at 283. For an extensive discussion of burden analysis in RFRA cases, *see Mack v. O'Leary*, 80 F. 3d 1175 (7th Cir. 1996).

this issue is firm because it is our collective experience that our religious beliefs and practices are increasingly vulnerable to the insensitivity of governmental bodies who insist upon the application of burdensome governmental regulations to religious organizations, without regard for the fundamental significance of religious freedom in our constitutio al order. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

In this environment, all religious communities suffer equally. In our national imagery the bell is typically a symbol of human freedom. It rings to proclaim justice in the land. But it can also toll slowly to signalize communal grief at a loss or a death. As John Donne taught us centuries ago, "Ask not for whom the bell tolls; it tolls for thee."

When a religious belief is stifled by bureaucracy, that is a kind of dying that affects us all. When, as here, a Roman Catholic Archbishop is told by a municipality that he and his community may not build a church sufficiently large to afford his fellow Catholics an opportunity to worship as the canons of their church require, that is a kind of dying that causes concern and even grief for us all. And when a federal district court tells this Archbishop that Congress and the Chief Executive exceeded their constitutional authority when they enacted RFRA, that too is a death knell for religious freedom. By contrast, when the court of appeals reverses that district court and sustains RFRA, the bell of freedom peals crisply for all of us, who are free to worship God according to the dictates of conscience. What troubles us most in this long interim between the enactment of RFRA and the present moment is the uncertainty about the ringing of

the bell. We know the difference between peals of joy and a death knell, and we never know whether a court is going to order the one or the other. Respondent Flores notes that no appellate court has yet invalidated RFRA, but lower courts have frequently held that RFRA is constitutionally infirm. In this atmosphere of uncertainty, the time is ripe for this Court to resolve this issue definitively.

As suggested both by the facts in this record and by the story referred to above about the intention of a prosecutor to use a sacramental confession in a homicide case, the kinds of harms we have experienced in this period after the enactment of RFRA go to the very heart and soul of our identity and mission as religious communities. Nothing symbolizes the current state of hostility toward religious communities more virulently than the rash of burnings of churches, principally of African-Americans, that has recently scarred our nation's history. Along with right-thinking persons of all faiths and of no religious faith, the Coalition emphatically rejects this violence. Although we acknowledge that this case is in no way causally related to these church bombings, the sad effect of both the bombings and the application of historical preservation ordinances to churches is the same, to deprive the faithful of a house of prayer according to the dictates of conscience. There can be no violation of free exercise of religion more obvious than governmental interference with the ability of a religious community to worship in the manner that God has enjoined. As such, this case serves as an excellent vehicle for this Court to signal its own concern for the independence of religious communities from stifling governmental control.

II. This Court Has Acted Promptly in the Past to Resolve any Doubt about the Authority of Congress to Protect Important Civil Rights, and the Court Should Take this Case to Clarify that the Religious Freedom Restoration Act is a Valid Exercise of Congressional Power to Secure the First of our Civil Liberties, Religious Freedom.

One of the prudential rules that guide the discretion of the Court as it shapes its docket is to wait for a clear conflict in authority among the courts of appeals, or between a federal court of appeals and the highest tribunal of one of the several states. Rule 10, Rules of the Supreme Court of the United States. This rule is not, however, inflexible. Respondent Flores has noted in his statement in response to the Petition for certiorari that the Court frequently reviews the constitutionality of federal statutes without waiting for a split in circuit authority. Statement of Flores at 5-6.

The Coalition notes that the Court has acted promptly to dispel doubts about important civil rights legislation in the past. For example, the Court acted with remarkable speed to sustain the Civil Rights Act of 1964 against constitutional challenges. Perhaps the most significant federal statute of this century, this legislation was not enacted swiftly or without struggle. On the contrary, the opponents of this legislation conducted the longest filibuster in the history of the United States Senate, lasting 82 working days and comprising over ten million words spread out on over 63,000 pages of the *Congressional Record*. On June 17, the Senate voted 76-18 to close off further debate. Two days later the Senate voted 73-27

to pass a compromise version of the bill that had bipartisan support from the Majority Leader and the Minority Leader. When the bill returned to the House, many members of the House were dissatisfied with the Senate version of this landmark legislation, which they viewed as weaker on key provisions. To avoid any further delay that would come from attempting to reconcile the House version and the Senate version in a conference committee, however, the House approved the Senate version of the bill on July 2, 1964. On the same day President Lyndon Johnson signed the bill into law. Pub. L. 88-352, 78 Stat. 241.

Legislative conflict and delay were met with judicial unanimity and expedition in this Court. Within days, a motel in Atlanta, Georgia, challenged the constitutionality of Title II of the new act, prohibiting racial discrimination in public accommodations. Acting Attorney General Katzenbach immediately filed a counterclaim, seeking an injunction against future violations of the act by the plaintiff. The three-judge district court empaneled to hear the constitutional challenge to the act promptly held a hearing on the requests for injunctive relief. On July 22, less than three weeks after the enactment of the legislation, the district court sustained the act, issued a permanent injunction against the motel to commence on August 11, and refused to stay the injunction. *Heart of Atlanta Motel v. United States*, 231 F. Supp. 393 (N.D. Ga. 1964).

On August 10, Justice Black, acting in his capacity as Circuit Justice, denied an application from the motel and an adjacent restaurant operated by Lester Maddox for a stay of the injunction, on the view that "a temporary

injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect." Justice Black also noted that "the constitutionally chosen policies of the Act challenged in these cases are not the result of sudden, impulsive legislative action, but represent the culmination of one of the most thorough debates in the history of Congress." And he agreed with the appellants and with the Solicitor General "as to the wisdom of having the specific constitutional issues here involved decided at as early a date as orderly procedure will permit." *Heart of Atlanta Motel v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., Circuit Justice).

On the first Monday of its October Term, the Court not only noted probable jurisdiction in the case, but also granted a joint motion for acceleration of oral argument and heard the case on the very same day. *Heart of Atlanta Motel v. United States*, 379 U.S. 803 (1964). On December 14, barely five months after the legislation had been enacted, the Court issued an unanimous opinion sustaining the Civil Rights Act of 1964. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

There are important differences between RFRA and Title II of the Civil Rights Act. The one protects the free exercise of religion against excessive regulation by the government; the other is aimed at the evil of discrimination on the basis of race, color, religion, or national origin, principally by private parties. But these differences are not as important as the profound similarities between these two acts of Congress. Both are instances of landmark legislation in which Congress acted affirmatively and by an overwhelming bipartisan majority to create a

statutory remedy directly aimed at securing civil liberties and civil rights more adequately than under a leading precedent of this Court, whether *Smith* or the infamous *Civil Rights Cases*, 109 U.S. 3 (1883).

We know that we will not prevail in every skirmish with state and local government over the application of RFRA to our various beliefs and practices, any more than the NAACP Legal Defense Fund is guaranteed victory in all of the litigation it has brought under federal civil rights statutes. But we urge the Court to affirm the crucial protection that religious believers and their communities now enjoy under RFRA.

We note that the rule announced in *Smith* commanded only a bare majority of the Court. *See, e.g., Smith*, 494 U.S. at 890 (O'Connor, J., concurring in the judgment). Some members of the Court may be prepared to revisit *Smith*, with a view to overruling it as a departure from sound constitutional jurisprudence. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) ("in a case presenting the issue, the Court should re-examine the rule *Smith* declared"); *see also Swanner v. Anchorage Equal Rights Commission*, 115 S. Ct. 460 (1995) (Thomas, J., dissenting from denial of certiorari) (urging adherence to compelling interest standard in RFRA).

In our view the Court should reverse *Smith*. The sooner, the better. But as long as the Court is not prepared to do so, it should at least act promptly to remove any lingering doubt that Congress acted well within its powers when it responded to *Smith* with appropriate remedial legislation to safeguard religious freedom. This

case affords the Court a clean record and a clear opportunity to signal to the Nation that it meant what it said when it sent the religious communities to the legislative branch to secure our most cherished religious beliefs and practices. *Smith, supra,* 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

CONCLUSION

For the foregoing reasons, the amicus respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted, and that the judgment of that court be affirmed.

Respectfully submitted,

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APPENDIX A

Members of the Coalition for the Free Exercise of Religion

The members of the Coalition for the Free Exercise of Religion include: Agudath Israel of America, The Aleph Institute, American Association of Christian Schools, American Baptist Churches USA, American Civil Liberties Union, American Conference on Religious Movements, American Ethical Union – Washington Ethical Action Office, American Humanist Association, American Jewish Committee, American Jewish Congress, American Muslim Council, Americans for Democratic Action, Americans for Religious Liberty, Americans United for Separation of Church & State, Anti-Defamation League, Association of Christian Schools International, Association of American Indian Affairs, Baptist Joint Committee on Public Affairs, B'nai B'rith, Central Conference of American Rabbis, Christian Church (Disciples of Christ), Christian Legal Society, Christian Life Commission, Southern Baptist Convention, Christian Science Committee on Publication, Church of the Brethren, Church of Jesus Christ of Latter-day Saints, Church of Scientology International, Coalition for Christian Colleges and Universities, Coalitions for America, Concerned Women for America, Council of Jewish Federations, Council on Religious Freedom, Council on Spiritual Practices, Criminal Justice Policy Foundation, Episcopal Church, Evangelical Lutheran Church in America, Friends Committee on National Legislation, General Conference on Seventh-day Adventists, Guru Gobind Singh Foundation, Hadassah – the Women's Zionist Organization of America, Inc., Home School Legal Defense Association, International

Association of Jewish Lawyers and Jurists, International Institute for Religious Freedom, Japanese American Citizens League, The Jewish Reconstructionist Federation, Justice Fellowship, Mennonite Central Committee U.S., Muslim Prison Federation, National Association of Evangelicals, National Campaign for a Peace Tax Fund, National Council of Churches of Christ in the USA, National Council of Jewish Women, National Council on Islamic Affairs, National Jewish Commission on Law and Public Affairs, National Jewish Community Relations Advisory Council, National Sikh Center, Native American Church of North America, Native American Rights Fund, North American Council For Muslim Women, People For the American Way Action Fund, Peyote Way Church of God, Rabbinical Council of America, Soka-Gakkai International-USA, Traditional Values Coalition, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, Unitarian Universalist Association of Congregations, United Church of Christ – Office for Church in Society, United Synagogue of Conservative Judaism, Women of Reform Judaism – Federation of Temple Sisterhoods.

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Supreme Court, U.S.
FILED
AUG 26 1996
CLERK

No. 96- ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA.

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF OHIO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, SOUTH DAKOTA, VERMONT AND THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF PETITIONER, CITY OF BOERNE, TEXAS

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QUESTION PRESENTED

DOES THE RELIGIOUS FREEDOM RESTORATION ACT EXCEED CONGRESSIONAL AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF AMICUS INTEREST

Amicus State of Ohio and 15 other amici States write to urge the Court to grant certiorari in this case to address a federal question of great magnitude to the States and to resolve a conflict of authority among the lower courts that is growing day by day.

At issue in this matter, as well as in cases in several other federal circuits, is the constitutionality of The Religious Freedom Restoration Act ("RFRA" or the "Act"), 42 U.S.C. §§ 2000bb *et seq.* *See* Appendix Item A, Table of Cases involving RFRA. Enacted in 1993, RFRA was designed to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), and to "restore" the strict scrutiny test applicable to claims arising under the Free Exercise Clause of the First Amendment to the United States Constitution.

The status of RFRA is an important issue to the States for one essential reason: The law has dramatically increased the volume of inmate litigation and in the process has created unique burdens for prison administrators, State Attorneys General and other State officials.

Running a safe, secure, and orderly prison system is one of the most difficult tasks consigned to State governments. RFRA exacerbates the challenges of this task by creating new security threats posed by inmate gangs and by racially divisive activities within prisons. It does so by frequently allowing gangs and like-minded groups to shroud illicit activity under the cover of "religious" belief. Even though many claims now confronting State prison officials would not have met the requirements of Rule 11 under prior law, they now are being litigated anew in every corner of the country. Aside from the litigation expense itself caused by these lawsuits, this development requires corrections officials

to divert extensive amounts of staff time to investigate the "religious" nature of the groups and the "religious" necessity of specific activities engaged in by those groups. Making matters worse is the restoration of the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate these disruptive activities. *See* Appendix Item B, letter of Kim Tucker; Appendix Item C, letter of Reverends Karlen and Schwarz.[1]

The second problem created by RFRA is the massive diversion of resources caused by this litigation wave and by inmate demands for special accommodations. A LEXIS/NEXIS search conducted during the week of July 15, 1996 revealed that no less than 288 cases involving RFRA have been decided by state and federal courts in the less than three years since its enactment.[2] Of these cases, 155 involved prisoners. And over a dozen of these cases were brought as class actions.

In addition to the increase in the volume of cases filed under the new law, corrections officials must deal with the fact that these cases are harder to dispose of than most due to the courts' understandable difficulty in deciding what accommodations are truly necessary for the proper exercise of a given religion. The litigation thus requires prison officials to divert staff from normal duties in order to attend depositions, give testimony, supply affidavits and the like. It also multiplies the case load of the State Attorneys General

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[1] All references to items included in the Appendix to this brief will be made to "App. Item."

[2] These results were obtained by searching the term "religious freedom restoration" in the "mega" library and "mega" file of LEXIS/NEXIS and then modifying the search to include the terms "inmate" or "prisoner."

responsible for representing State prison wardens. This diversion of resources is particularly frustrating to the States since most of the issues now being litigated were previously resolved favorably to the States under the "reasonableness" test established in *O'Lone v. Estate Of Shabazz*, 482 U.S. 342 (1987).

Perhaps most frustrating of all, RFRA has undermined the very goal it was meant to advance -- sensitivity to the religious beliefs of prison inmates. The increase in litigation and internal demands for accommodations divert chaplains and other religious services personnel from their core mission of facilitating and delivering religious services to prisoners. Preliminary results from a national survey indicate that the increased demands for time and space for activities by such previously obscure religions as Satanism, Wicca and Asatru have resulted in less time and space being made available to more numerous Christian and Islamic inmates. That survey also indicates that increased conflict with more militant inmates has resulted in less volunteer religious programming being made available by outside providers. Some prison systems have become so frustrated with the impact of RFRA that they have discontinued all state-supported religious programming. *See* Appendix Items B and C.

REASONS FOR GRANTING THE WRIT

A. There Is A Growing Conflict Of Authority Among The Lower Courts On The Constitutionality Of RFRA.

The first reason for granting the writ is the current -- and burgeoning -- lower court conflict on the issue. While just two federal courts of appeals have weighed in on whether RFRA is unconstitutional as applied to the States,

several lower courts have already done so. All told, two lower courts have held the Act unconstitutional. *See Cardinal William H. Keeler v. Mayor & City Council of Cumberland*, 1996 U.S. Dist. LEXIS 8090 (D. Md. 1996); *In re Tessier*, 190 B.R. 296 (Bankr. D. Mont. 1995). And four lower courts have held the Act constitutional. *See Flores*; *Sasnett v. Sullivan*, No. 95-3924, 1996 U.S. App. LEXIS 19203 (7th Cir. 1996); *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Haw. 1995); *Gallo v. Salesian Society, Inc.*, 676 A.2d 580 (N.J. Super. Ct. App. Div. 1996)..

In addition to these cases from the Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeals and from one state court, the constitutionality of RFRA has been called into question in a number of federal district and state courts (see Appendix Item A), including a recent challenge made by the State of Ohio in federal court in *Syder v. Voinovich*, No. C2-94-536 (S.D. Ohio August 7, 1996). The volume of cases in which RFRA's validity has been called into question make clear that the validity of this law is ripe for review by the Court.

B. The Validity Of RFRA Raises An Exceedingly Important Federal Question For The States.

The unconstitutionality of RFRA also presents a federal question of great importance to the States. Even though RFRA has been on the books for less than three years, it has generated an enormous amount of litigation. As noted above, no less than 288 cases have already relied on the Act and in many of these cases RFRA's validity has been questioned. *See* Appendix Item A.

Most notably, the passage of RFRA has had a disruptive effect on the ability of the states to exercise their

sovereign power in the fulfillment of one of their most difficult responsibilities -- the operation of State prisons. As the Court noted in *Bell v. Wolfish*, 441 U.S. 520 (1974):

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security ... *such considerations are peculiarly within the province and professional expertise of corrections officials*

Id. at 547 (emphasis added) (citations and internal punctuation omitted).

Just this Term, the Court reiterated the disruptive effect that strict scrutiny would have on prison operations:

> We held in *Turner v. Safley*, 482 U.S. 78 (1987), that a prison regulation impinging on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Id.*, at 89. Such a deferential standard is necessary, we explained,
>
> "if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.' *Subjecting the day-to-day judgments of prison officials to an inflexible strict-scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of*

> *prison administration." Ibid.* (citation omitted), quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977).
>
> These are the same concerns that led us to encourage "local experimentation"....

Lewis v. Casey, 116 S. Ct. 2174, 2185 (1996) (emphasis added).

In the end, it is difficult to overstate the impact that RFRA has had on the States' administration of their prisons. This fact alone provides a compelling reason for reviewing now (rather than later) the question whether Congress has exceeded its authority in this delicate area of State-federal relations.

C. The Lower Court Erred In Concluding That Congress Did Not Exceed Its Authority In Enacting RFRA.

Employment Division v. Smith, 494 U.S. 872 (1990), held that facially neutral and generally applicable laws, which only incidentally infringe religious practices, do not violate the Free Exercise Clause. In doing so, *Smith* determined that strict scrutiny does not apply to such claims and that such a test in any event is unworkable in this setting. Unhappy with the *Smith* decision, Congress simply tried to overrule it. As explicitly acknowledged in the statute itself, *see* 42 U.S.C. §§ 2000bb(a)(4-5), (b)(1), Congress created RFRA in order to "restore" the strict scrutiny standard invalidated in *Smith*. Any power that Congress has under section 5 to enforce the Fourteenth Amendment, however, simply does not go that far -- to an Act that does not address a specific legislative problem but attempts to erect a standard of review for courts assessing future legislation, to an Act that does not remedy

a constitutional wrong but attempts to create a constitutional right, and to an Act that at bottom circumvents the constitutional route -- amendment or overruling -- for addressing unfavorable Supreme Court decisions. Neither Congress's "enforcement" authority nor its "remedial" authority under section 5, *see South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), and *City of Rome v. United States*, 446 U.S. 156, 177 n.12 (1980), supports the passage of RFRA.

1. RFRA Exceeds Congress's Limited "Enforcement" Authority Under Section 5.

As a matter of plain meaning and common sense, there is no plausible argument that RFRA was enacted to "enforce" the 14th Amendment, specifically the now-incorporated Free Exercise Clause of the First Amendment. According to *Smith*, the Free Exercise Clause means that generally applicable, facially neutral laws do not receive strict scrutiny. But, according to Congress's efforts to enforce that provision, RFRA now requires strict scrutiny for such claims. Far from enforcing the Bill of Rights in this instance, Congress simply has tried to change its meaning. Under these circumstances, Respondent cannot tenably argue that RFRA in any way "enforces" the Free Exercise Clause.

2. RFRA Exceeds Congress's Limited "Remedial" Authority Under Section 5.

No less helpful is the so-called "remedial" theory of section 5 power. *First*, to the States' knowledge, the United States Supreme Court has just approved this discrete theory of section 5 power in the core Fourteenth Amendment areas of race and voting rights. For example, in the three leading

cases, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980), the Court recognized that Congress had a limited remedial power to eradicate conduct found to perpetuate racial discrimination relative to voting, *South Carolina*, 383 U.S. at 324; *Morgan*, 384 U.S. at 650; and to guard against future racial discrimination relative to voting, *City of Rome*, 446 U.S. at 177. *But see Hutto v. Finney*, 437 U.S. 678, 698 n. 31 (1978) (indicating in *dicta* that § 5 applies to incorporated rights.)

Even in the areas of race and voting, moreover, section 5 is not a writ large that gives Congress unlimited authority to regulate state conduct. As the Court reminded Congress in *Oregon v. Mitchell*, 400 U.S. 112 (1970), there are important limitations on this power. *Mitchell* dealt with legislation that, among other things, attempted to lower the voting age to eighteen in all federal and state elections. Yet, even though the legislation dealt with the core Fourteenth Amendment value of voting rights, the Court ruled that Congress could not impose such a requirement on the States. *Id.* at 130 (Black, J., announcing judgment of Court). *See also Id.* at 212-13 (Harlan, J., concurring in part).

At all events, whatever the permutations of section 5 with respect to race and voting, RFRA is the easy case. It does not even pretend to deal with race or voting rights, the core values protected by the Civil War Amendments. The only "evil" Congress attempted to "root out" is the Supreme Court's decision in *Smith*, which concerns "free exercise" rights. And the only "remedy" RFRA provides is Congress's own interpretation of the free exercise clause. No precedent supports this exercise of section 5 power -- whether brought in the name of an "enforcement" or "remedial" theory.

Second, in each of the few cases upholding Congress's exercise of section 5 power, the legislature identified a specific area of State legislation that undermined the goals of the Fourteenth Amendment and sought to eradicate these specific types of state law practices. But in none of these cases did Congress simply prescribe a *standard of review* for courts to use in assessing all future individual claims that the government had trampled on a Bill of Rights' guarantee. In this respect, RFRA differs from every section 5 case before it. It is purely definitional in nature, which is precisely the conclusion that Judge McMillian of the Eighth Circuit properly reached in explaining why RFRA is unconstitutional.

> Through RFRA's passage, Congress did not attempt to root out a particular evil, such as literacy tests, which were often means for perpetuating racial discrimination, but simply expressed the normative judgment that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb(a)(3). *This is the role given to the Supreme Court, not Congress, by the Constitution.*
>
> *RFRA is neither remedial nor supplemental, but definitional. Morgan* upheld a law which, as the Court indicated, Congress might have rationally concluded would either remedy past invidious discrimination or prevent future discriminatory conduct. In RFRA, however, Congress establishes a rejected method of analysis of all free exercise claims simply because Congress interprets the Free Exercise Clause differently than the Supreme Court. *This is not prophylaxis but unconstitutional*

> *interbranch hegemony.* ... Consequently, I would hold that the enactment of RFRA was not a valid exercise of § 5 power. To hold otherwise would be inconsistent with the essence of judicial review and the separation of powers. ... Section 5 grants Congress the power to supplement, not subvert, the Supreme Court's underlying constitutional jurisprudence.

Hamilton v. Schriro, 74 F.3d 1545, 1570 (8th Cir. 1996) (McMillian, J., dissenting in part) (emphasis added). (Other members of the *Hamilton* panel did not reach the constitutional question.)

In weighing the competing interests involved in *Smith* and in determining what the Bill of Rights requires, the United States Supreme Court was carrying out its quintessential function as the "ultimate interpreter of the constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *United States v. Nixon*, 418 U.S. 683, 705 (1974). Nor can there be any legitimate doubt that the essential -- and intended -- consequence of RFRA is legislatively to reweigh those constitutional interests in cases involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4).

Such a legislative trespass into the judicial sphere is neither warranted nor proper. Congress may not exceed "its authority by requiring the federal courts to exercise 'the judicial Power of the United States,' U.S. Const., Art. III, § 1, in a manner repugnant to the text, structure and traditions of Article III." *Plaut v. Spendthrift Farms, Inc.*,

115 S. Ct. 1447, 1452 (1995). *See also Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 851 (1986). Here, however, the Act does precisely that. It defines the proper standard of review for all courts to apply in assessing claims involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4).

The specific separation of powers problem created by RFRA, then, is not that Congress has considered the meaning of a provision of the Bill of Rights. Congress presumably does that all the time in determining whether proposed legislation is constitutional. Rather, the problem is that the legislature has gone a step further. It has not only made an independent interpretation of what the Constitution means, but it has also seen fit to make that interpretation binding on all courts faced with future free exercise claims by announcing the appropriate standard of review for all claims involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4). To the States' knowledge, in fact, Congress has never before changed the Court's interpretation of a Bill of Rights provision in this way by redefining, for all future cases involving that right, the relationship between the individual right asserted and the countervailing power of government.[3]

---

[3] For these reasons, RFRA also represents an end run around the normal process for altering Supreme Court interpretations of the Constitution -- the amendment process. Under Article 5, the Constitution may only be amended through a two-thirds vote of each House and approval of three-fourths of the States. As Justice Harlan indicated in *Oregon v. Mitchell*, permitting Congress to use its section 5 powers to reverse Supreme Court decisions offends that requirement:

Third, even aside from RFRA's failure to remedy voting rights or race violations and even aside from its failure to root out a specific type of state law or practice, the statute contains another constitutional flaw. It does not even pretend to exercise the kind of congressional power that section 5 contemplates. Notwithstanding the act's "findings," RFRA contains no indicia that Congress employed its "specially informed legislative competence" from which the Court might discern the "predicate" for Congress's "judgment" in this area. *Morgan*, 384 U.S. at 656. For example, there is no finding that the country is having problems with neutral state laws impinging on the religious freedom of citizens. Nor does the specific fact pattern at issue in *Smith* -- Native American use of peyote as a religious practice -- even begin to justify the far-reaching legislation that Congress passed. To prove the point, consider the Court's reaction if Congress in the 1960's had exercised its section 5 power in the same way that RFRA

> In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. *To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.*

400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part) (emphasis added). Far from respecting this prescribed route for changing the meaning of the Constitution, Congress has simply devised a mechanism for circumventing it. That bodes ill for the Free Exercise Clause, as well as for other protections of the Bill of Rights. It also completely eliminates any meaningful role the States were intended to have in altering the Constitution.

does with respect to voting rights matters. Instead of passing the Voting Rights Act of 1965, which targeted specific voting rights problems and specific voting rights practices, Congress would have passed a law that dictated to federal courts the appropriate standard of review for all voting rights challenges -- for example, holding that they all receive strict scrutiny even if no intentional discrimination is shown. It is unfathomable that even *South Carolina* and *Morgan* would have permitted such a trespass on the judicial branch. *See Mitchell*, 400 U.S. at 204-05 (Harlan, J., dissenting); *id.* at 128, 130 (Black, J., writing for the court); *id.* at 142-43 (Douglas, J., concurring in part, dissenting in part); and *id.* at 293, 295-96 (Stewart, J., concurring in part, dissenting in part).

In the end, the only "judgment" Congress exercised in passing RFRA was its disagreement with *Smith*. Such "findings," or more precisely the lack thereof, would not support legislation related to race and voting rights, let alone legislation having to do with religion. *Morgan*, 384 U.S. at 653. Deference thus is only appropriate in an area in which Congress is competent to act, which simply does not include the appropriate standard of review for assessing free exercise claims. *Oregon v. Mitchell*, 400 U.S. at 204-209 (Harlan, J., dissenting). Ultimately, Congress cannot justify RFRA on any remedial theory of section 5 power because there is no known constitutional wrong that the statute attempts to fix and no recognized congressional competence that the statute attempts to exercise.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request the Court to grant the petition for certiorari.

Respectfully submitted,

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APPENDIX ITEM A

TABLE OF CASES INVOLVING THE RELIGIOUS FREEDOM RESTORATION ACT

Cases Deciding the Constitutional Issue

Found Constitutional

Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996)

EEOC v. Catholic University of America, Nos. 94-5263 & 94-5283, 1996 U.S. App. LEXIS 11205 (D.C. Cir. 1996)[1]

Abordo v. Hawaii, 902 F. Supp. 1220 and *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Haw. 1995)

State v. Miller, 538 N.W.2d 575 and *Sasnett v. Wisconsin Dept. of Corrections*, 891 F. Supp. 1305 (Wis. 1995)

Waahid Muslim v. Frame, 891 F. Supp. 226 (E.D. Pa. 1995) (Murphy, P.J., concurring) (dicta)

Gallo v. Salesian Society, Inc., 676 A.2d 580 (N.J. Super. Ct. App. Div. 1996); *South Jersey Catholic School Teachers Assn. v. St. Theresa*, 675 A.2d 1155 (N.J. Super Ct. App. Div. 1996); and *Ryslik v. Krass*, 652 A.2d 767 (N.J. Super. Ct. App. Div. 1995)

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[1] Found Constitutional as applied to the federal government.

Found Unconstitutional

Hamilton v. Schriro, 73 F.3d 1545 (8th Cir. 1996) (McMillian, J., dissenting)

Keeler v. Mayor of Cumberland, 1996 U.S. Dist. LEXIS 8090 (D.Md. 1996)

In re Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995)

Smith v. Fair Employment and Housing Commission, 913 P.2d 909 (Cal. 1996) (Mosk, J., concurring)

Cases noting but not deciding the constitutional issue

2nd Cir.

Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839 (2nd Cir. 1996)

Mincone v. Nassau County Community College, 932 F. Supp. 598 (E.D.N.Y. 1996)

Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995)

Davidson v. Coughlin, No. 88 CV 646, 1995 U.S. Dist. LEXIS 19077 (N.D.N.Y. 1995)

Brown v. Keane, 888 F. Supp. 568 (S.D.N.Y. 1995)

Muhammed v. City of New York Dept. of Corrections, 904 F.Supp. 161 (S.D.N.Y. 1995)

Reese v. Coughlin, 93 Div 4748, 1996 U.S. Dist. LEXIS 9206 (S.D.N.Y. 1996)

Bass v. Grottoli, No. 94 Civ 3220 (MGC), 1995 U.S. Dist. LEXIS 13906 (S.D.N.Y. 1995)

3rd Cir.

Abdul-Akbar v. Dept. of Corrections, 910 F. Supp. 986 (D. Del. 1995)

4th Cir.

American Life League v. Reno, 47 F.3d 642 (4th Cir. 1995)

Goodall v. Stafford County School Bd., 60 F.3d 168 (4th Cir. 1995)

Cochran v. Morris, 74 F.3d 1310 (4th Cir. 1996) (en banc)

5th Cir.

Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995)

6th Cir.

Miller-Bey v. Schultz, No. 94-1583, 1996 U.S. App. LEXIS 6541 (6th Cir. 1996)

Akbar-El v. Wise, No. 94-3808, 1996 U.S. App. LEXIS 2788 (6th Cir. 1996)

Kensu v. Cason, No. 91-CV-300, 1996 U.S. Dist. LEXIS 5468 (W.D. Mich. 1996)

7th Cir.

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994)

Van Dyke v. Washington, 896 F. Supp. 183 (C.D. Ill. 1995)

Kennedy v. Peters, No. 92 C 20209, 1995 U.S. Dist. LEXIS 2429 (N.D. Ill. 1995)

C.L.U.B. v. City of Chicago, 94 C 615, 1996 U.S. Dist. LEXIS 2230 (N.D. Ill. 1996)

Reimann v. Murphy, 897 F. Supp. 398 (E.D. Wis. 1995)

Haff v. Cooke, 923 F. Supp. 1104 (E.D. Wis. 1996)

George v. Sullivan, 896 F. Supp. 895 (W.D. Wis. 1995)

8th Cir.

United States v. Brown, No. 95-1616, 1995 U.S. App. LEXIS 34750 (8th Cir. 1995)

In re Young, No. 93-2267, 1996 U.S. App. LEXIS 10246 (8th Cir. 1996)

Watson v. Ivester, No. 4:95 CV588 DNN, 1996 U.S. Dist. LEXIS 7128 (E.D. Mo. 1996)

Rust v. Clarke, 883 F. Supp. 1293 (D. Neb. 1995)

9th Cir.

Cheema v. Thompson, 67 F.3d 483 (9th Cir. 1995) (Wiggins, J., dissenting)

Anderson v. Angelone, 86 F.3d 932 (9th Cir. 1996)

10th Cir.

Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996)

Snyder v. Murray City Corp., 902 F. Supp. 1444 (D. Utah 1995)

United States v. Meyers, 606 F. Supp. 1494 (D. Wyo. 1995)

11th Cir.

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995)

Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996)

Grosz v. City of Miami Beach, 82 F.3d 1005 (11th Cir. 1996)

Lawson v. Singletary, 85 F.3d 502 (11th Cir. 1996)

Daytona Rescue Mission Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995)

Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994)

D.C. Cir.

Found v. INS, 892 F. Supp. 298 (D.D.C. 1995)

State Courts

Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996)

Porth v. Roman Catholic Diocese of Kalamazoo, 532 N.W. 2d 195 (Mich. Ct. App. 1994)

Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 544 N.W.2d 698 (Mich. Ct. App. 1995)

Blandino v. State, 914 P.2d 624 (Nev. 1996)

Maute v. Frank, 670 A.2d 737 (Pa. Commw. Ct. 1995)

Tilton v. Marshall, No. 94-1233, 1996 Tex. LEXIS 111 (Tex. 1996)

APPENDIX ITEM B

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MEMORANDUM

TO: Robert A. Butterworth
Attorney General

Harry Singletary
Secretary
Florida Department of Corrections

FROM: Kim Tucker
Deputy General Counsel

DATE: July 19, 1996

RE: Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Systems

---

This is to summarize the preliminary results of the national survey on the impact of the Religious Freedom Restoration Act (RFRA) on state correctional systems.

As you know, RFRA's mandated abandonment of the

constitutional standard for review of free exercise of religion claims in the prison context, enunciated by the U.S. Supreme Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), has had a tremendously negative impact in Florida. RFRA has resulted in a significant increase in the number of claims for exemptions from security regulations and requests for special privileges. It has also resulted in an increase in the number of cases brought claiming the right to exemptions under this Act, increased the cost in staff and financial resources to evaluate and litigate such claims, and has required Florida as a State to relitigate claims previously won even under the Eleventh Circuit's pre-*O'Lone* "strict scrutiny" standard. What is most distressing is the nature of the recent prison actions. If anything, the recent RFRA claims are more bogus or bizarre than our previous experience.

At the Spring meeting of the National Association of Attorneys General (NAAG), in Washington, D.C., it became painfully apparent that other states were experiencing similar deleterious consequences from the application of this Act in the prison context. This issue was raised by the Attorney General to both the President and Attorney General Janet Reno. General Reno responded by requesting additional information on the costs and consequences of RFRA in prisons and jails. As a result, we undertook the process of surveying all states, the District of Columbia, and the U.S. Territories and Commonwealths on the impact of RFRA on their correctional systems. Surveys were sent by NAAG to the Attorneys General and Secretary Singletary sent surveys to each of the Directors of correctional systems in the States and Territories, as well as several of the larger jail systems. Pursuant to your direction, I am managing the collection and assessment of the survey responses.

I am pleased to report that of the 56 States and Territories to

which the survey was sent, we have received responses from the Attorneys General and Department of Corrections in 33, so far, and we have been provided assurances from the others that their responses are in progress.

As discussed more fully below, RFRA has had a very significant, and very adverse, impact upon corrections systems in three major ways. First, RFRA has been utilized by racial hate groups and other inmate gangs to insulate their activities from the oversight and control of corrections officials. Second, there has been a tremendous increase in the number of lawsuits and internal demands for "religiously motivated" alterations of prison practices, creating significant burdens on the resources of corrections systems, state attorneys general, and the courts. The enactment of RFRA has resulted in the proliferation of claims for exemptions from prison security regulations and requests for special privileges, grounded in obscure or previously little-known "religions", including: Wicca, Satanism, Odinism, Asartu, and Luciferianism. Third, the enactment of RFRA has been followed by a reduction in the availability of religious programming in some state correctional systems.

Perhaps the most prevalent and disturbing pattern is the use of RFRA by inmate groups to insulate their activities from regulation by prison officials. Inmate groups and gangs have recognized that RFRA's "least restrictive means" test makes it very difficult for corrections officials to restrict activity allegedly motivated by religion and, consequently, have claimed religious status for their groups and religious motivation for their actions. Where previously prison officials successfully prevented gangs from wearing colors or emblems, these same groups now assert the right to wear special clothing or medallions as expressions of religious freedom. Since the federal courts are loathe to challenge the sincerity of religious claims and because it is difficult to

overcome the "least restrictive means" test in the assertion of this type of claim, this is providing inmates an avenue for circumventing the legitimate security concerns of correctional institutions and encouraging the proliferation of gangs in prisons. Like Florida, most states responding to the survey have indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation, as well as street gangs.

A second common and disturbing pattern is a tremendous drain on the resources of state correctional systems, State Attorneys General, and the courts. Most states have reported a significant increase in the number of inmate lawsuits asserting religious claims since the enactment of RFRA. There have been particularly noticeable increases in the States of Arizona and New York. Most lawsuits involve issues settled prior the enactment of RFRA, under the analysis established in *O'Lone*. This mostly redundant litigation requires correctional systems to divert employees from their normal tasks, requires State Attorneys General to devote significant staff to defend, and ties up court dockets across the country, in both state and federal courts.[1]

---

[1] Not only has there been a significant increase in the free exercise lawsuits since the enactment of RFRA, conversations with Assistant Attorneys General and staffs of Department of Corrections of other States has indicated that the individual cases are more time consuming and costly than prisoner suits under the previous Constitutional standard. During this year's NAAG Corrections Conference, in Albuquerque, NM, and in a recent NAAG conference call on RFRA, attorneys from several States related that courts are reluctant to dispose of such cases on summary judgment or similar grounds because of factual and legal questions about the religious necessity of the requested "accommodations."

Similarly, most of the responding states have noted significant increases in the number, belligerency, and unusual nature of inmates' internal demands for "religiously motivated" alterations to and exemptions from prison regulations. The large number of those requests, together with RFRA's "least restrictive means" requirement, are resulting in very significant burdens on the already overburdened corrections staffs due to the need to investigate the religious necessity and security impact of each of the growing number of demands.

Finally, and most ironically, the survey indicates that RFRA has actually resulted in a decrease in religious programming for most inmates in some States. The increased demands on staff time, described above, means that prison chaplains have less time to actually deliver religious services. In addition, increased demands for time and space by adherents to such previously obscure "religions" as Satanism, Wicca, Asatru, and Odinism[2] has resulted in less time and space being available for adherents of wide-spread, mainstream religions. Moreover, the increased stridency of inmate demands and doctrinal conflicts between inmates and potential volunteers

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[2] Prior to enactment of RFRA, these "religions" were rare or unheard of in the prison context. The survey indicates, however, that inmate claims of conversion to these "religions" has proliferated since enactment of RFRA. Similarly, RFRA has spawned a surfeit of inmate claims for special privileges and exemptions, allegedly grounded in the Native American religion; however, overwhelming these claims are asserted by inmates with no previous or legitimate claim to tribal affiliation. (e.g. claims of Virginia inmates Randall "Lone Wolf" Mullins and William "Two Eagles" Martin to the right to possess feathers from endangered eagles, despite federal law prohibitions against possession of such feathers by individuals who do not have an identification number from the Bureau of Indian Affairs. Ironically, the Justice Department has intervened in this case on the inmates' behalf.)

has resulted in less programming being available from outside groups, who had previously serviced the inmate populations. Finally, some States have become so frustrated with the difficulties resulting from RFRA that they have eliminated all State-funded religious programming in their prisons.[3]

As the foregoing makes clear, the preliminary results of the RFRA survey are very disturbing. It appears that, as anticipated prior to its enactment, RFRA has had a disruptive effect on the operation and security of the nation's prisons. The actual costs of imposition of this ill-conceived standard on State and local correctional facilities is difficult to calculate, but our survey shows taxpayer money being diverted to serve no public purpose. However, the costs are known to be significant and the risks created to staff and inmate safety are substantially increased. I will advise you further of the progress of the survey as additional results become available.

---

[3] The Departments of Corrections in Oklahoma and Colorado have discontinued State-funded Chaplaincy programs. Not all reductions in services to mainstream religions are intentional. For example, officials in Wyoming felt compelled by RFRA to allow a group of "Luciferians" to have an unsupervised service in the prison chapel. In an apparent burst of religious enthusiasm, the Luciferian inmates burned Christian hymnals and Bibles, making the books unavailable for Christian inmates to use, causing substantial smoke damage to the Chapel (thus, making it unavailable for general use by other inmates until repaired), and, obviously, creating a significant safety hazard to the life and safety of all inmates and staff within the institution.

APPENDIX ITEM C

July 17, 1996

Ms. Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0581

Re: The Effect of the Religious Freedom Restoration Act of 1993 on the Delivery of Religious Services in Ohio's Prisons

Dear Attorney General Montgomery,

We are writing as the Directors of Religious Services of the Ohio Department of Rehabilitation and Correction to describe the effect of the Religious Freedom Restoration Act of 1993 ("RFRA") on the delivery of religious services in Ohio's prisons. Ironically, RFRA has adversely affected the delivery of such services by limiting both the quantity and quality of staff time that can be devoted to religious matters.

Quantitatively, RFRA has forced religious services personnel to be diverted from tasks necessary to meet the spiritual needs of Ohio's inmates in order to respond to the significant legal and operational problems that have followed its enactment. Prior to RFRA, the Ohio Department of Rehabilitation and Correction ("ODRC") took a proactive approach to meeting the religious needs of inmates and we spent the vast majority of our time developing programming, recruiting and working with paid and volunteer providers of

religious services and working with the religious community at large regarding the needs of inmates. We were seldom involved in litigation or problems of statutory compliance.

Unfortunately, that changed dramatically after the enactment of RFRA. We now spend approximately 75 to 90 percent of our time dealing with legal and operational problems directly related to RFRA. More specifically, we spend between 15 to 25 percent of our time working with attorneys from your office on lawsuits arising under RFRA. In addition, we spend between 60 to 70 percent of our time consulting with institutional staff regarding compliance with RFRA. The cumulative result of those developments has been that we are now forced to take a reactive approach to religious matters, as opposed to our traditionally proactive approach.

That dramatic change has two interrelated causes. The first is that RFRA's least restrictive means test requires us to effectively "set up and shoot down" all possible alternatives for dealing with "religiously motivated" requests for alterations of normal prison operations. Considering and evaluating those mostly unworkable alternatives is tremendously time consuming. Time spent on those matters cannot be spent on facilitating the delivery of religious services of a non-disruptive nature.

Secondly, inmates and inmate groups have recognized, and abused, the fact that RFRA has shifted the burden of proof in religious matters. Since RFRA's enactment we have seen the proliferation of new, inmate created "religions" with such bizarre demands as group martial arts classes. In addition, we have seen a very large increase in requests for accommodations for previously unrecognized "requirements" of existing religions. Even more frighteningly, a number of inmate gangs, including racial hate groups, have claimed

"religious" status in order to insulate their illicit and disruptive activities from scrutiny by correctional staff. Although most abuses are ultimately detected and dealt with, that only occurs after a tremendous investment of time by religious services staff who must investigate the "religious" nature of the groups or faiths at issue and the "religious" basis for the individual accommodations requested. Once again, time spent on such tasks cannot be spent on the actual delivery of the services to inmates adhering to unquestionably legitimate and sincerely held religious beliefs.

Not only is that division of resources very disruptive, it is also very wasteful. Most of the accommodations sought involve matters that were analyzed and rejected under Pre-RFRA legal standards. However, R.F.R.A. has required that those matters be revisited, effectively requiring that each problem be analyzed twice. Once again, time spent on those largely redundant tasks is time that cannot be spent on the delivery of religious services that are not subject to any dispute.

The effect of RFRA on the quality of staff time devoted to delivery of religious services has been equally, if not more, deleterious. Prior to the enactment of RFRA religious services personnel were usually able to maintain a "pastoral" type of relationship with individual inmates, regardless of the faith of the individual staff member or inmate. However, because of the increased number of increasingly bizarre demands and the increasing militancy of inmates making such demands, religious services staff are becoming more skeptical, thereby straining the relationship from the perspective of the staff members. Similarly, because staff are increasingly required to demand proof of the religious basis for requested accommodations and frequently forced to deny requested accommodations inmates are beginning to view religious services personnel more as "enforcers" of

staff authority than as pastors. That hardly fosters the type of open, mutually accepting relationship that is vital to the effective delivery of religious services.

As the foregoing makes clear, RFRA has had a very significant and very adverse effect on the delivery of religious services in Ohio's prisons.

Sincerely,

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No. 95-2074

(8)

Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

versus

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 25, 1996
CERTIORARI GRANTED OCTOBER 15, 1996

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[1] Exhibit A, Ordinance 91-05 is reprinted in the Appendix to the Petition for Certiorari at 46a.

[2] Due to poor reproduction quality, the Historical District Map has been omitted. It may be found in the Record at page 273.

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6/13/94	Defendant's Original Answer filed
9/14/94	Defendant's Motion for Leave to File First Amended Original Answer filed
9/20/94	Plaintiff's Motion for Leave to File First Amended Complaint
9/21/94	Order granting motion for leave to file First Amended Original Answer
9/21/94	Defendant's First Amended Answer filed
9/29/94	Order granting motion for leave to file First Amended Complaint
9/29/94	Plaintiff's First Amended Complaint filed
10/6/94	Defendant's Motion for Leave to File Second Amended Original Answer
10/17/94	Defendant's Second Amended Original Answer filed
1/6/95	Plaintiff's Motion for Partial Summary Judgment
1/25/95	Defendant's Response to Motion for Partial Summary Judgment
2/2/95	Defendant's Motion for Leave to File Third Amended Answer
2/2/95	Defendant's Third Amended Answer filed
2/3/95	Order entered: Certification from the U.S. District Court for the Western District of Texas to Janet Reno, Attorney General
2/28/95	Plaintiff's Second Amended Complaint filed

3/1/95	Joint Pre-Trial Order filed
3/3/95	Defendant's Brief filed on the issue of the Constitutionality of the Religious Freedom Restoration Act
3/6/95	United States' Memorandum of Law in Support of the Constitutionality of the Religious Freedom Restoration Act filed
3/6/95	Plaintiff's Reply Brief filed on the issue of the Constitutionality of the Religious Freedom Restoration Act
3/10/95	Defendant's Fourth Amended Answer filed
3/10/95	Defendant's Reply Brief to the Plaintiff's Brief and the United States' Memorandum of Law in Support of the Constitutionality of the Religious Freedom Restoration Act
3/15/95	Order entered on Interlocutory Appeal to the Fifth Circuit Court of Appeals
3/15/95	Bench trial reset pending outcome of Interlocutory Appeal
3/15/95	Notice of appeal and certified copy of docket to USCA: appeal
3/15/95	Judgment of District Court entered
3/16/95	Order granting U.S. leave to intervene
3/31/95	Memorandum of Law by U.S. filed in support of the constitutionality of the Religious Freedom Restoration Act filed
3/31/95	Plaintiff's Reply Brief filed on the issue of Constitutionality of the Religious Freedom Restoration Act
5/9/95	Order granting leave to appeal

1/23/96	Opinion and judgment of the Court of Appeals for the Fifth Circuit Court
3/28/96	Denial of Suggestion for Rehearing En Banc by Court of Appeals for the Fifth Circuit Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES,	§	
ARCHBISHOP OF	§	
SAN ANTONIO	§	**CIVIL ACTION**
	§	**NO. SA94CA0421**
V.	§	
	§	
THE CITY OF BOERNE	§	

SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES P. F. FLORES, ARCHBISHOP OF SAN ANTONIO, Plaintiff, and, as permitted by the Court's Order of February 2, 1995, files his Second Amended Complaint against THE CITY OF BOERNE, Kendall County, Texas, Defendant, and for cause of action would show the Court the following:

PARTIES

1. P. F. Flores is the Archbishop of San Antonio ("Archbishop"), and is a resident of San Antonio, Bexar County, Texas.

2. The City of Boerne ("City") is an incorporated municipality located in Kendall County, Texas. The City has been served with citation and has entered its appearance herein.

3. The Attorney General of the State of Texas has been served with citation pursuant to Section 37.006 of the Texas Civil Practice and Remedies Code.

4. The Attorney General of the United States of America has acknowledged receipt of the Court's Certificate of February 3, 1995, pursuant to 28 U.S.C. § 2403(a).

JURISDICTION

5. This Court has jurisdiction of this civil action pursuant to the provisions of 28 U.S.C. § 1331.

VENUE

6. Venue of this civil action is proper in this Court under the provisions of 28 U.S.C. § 1391(b) for the following reasons:

a. A substantial part of the events or omissions giving rise to the claim occurred in this district; and

b. A substantial part of the property that is the subject of the action is situated in this district.

FACTUAL BACKGROUND

7. P. F. Flores, in his capacity as Archbishop of San Antonio, owns the building and appurtenant land commonly known as Saint Peter Catholic Church in the City of Boerne (the "Church" or "Saint Peter Church"). The Church is within the Archdiocese of San Antonio and is used exclusively for the practice of religion.

8. Since the Church was built in 1923, and especially in recent years, the population of the City of Boerne and the parish membership of Saint Peter Church have greatly increased. Saint Peter Church no longer has room to seat its parishioners at regular services.

9. In December of 1990, Plaintiff gave the parish priest, Reverend Anthony Cummins, permission to begin planning to enlarge St. Peter Church. A planning committee was established in March of 1991, and Saint Peter Church began planning an enlargement of the existing Church to afford seating space for parishioners at Sunday services.

10. Three months later, on June 25, 1991, the City Council enacted Ordinance Number 91-05 providing for the appointment of an Historic Landmark Commission (the "Landmark Commission"). A true and correct copy of Boerne City Ordinance Number 91-05 is attached hereto as **Exhibit "A"** and incorporated herein for all purposes.

11. Pursuant to the authority delegated to it by Ordinance Number 91-05, the Landmark Commission proposed the designation of an Historic District, which was adopted by the City Council in January of 1992 as Ordinance 91-15, (the "Historic District"). The Ordinance included and referred to the boundary on the historic district as drawn on the historic overlay map, but did not refer to or include the list of specific structures to be included in the historic district. The plat of the Historic District promulgated by the City shows the west boundary of the District bisecting the Church, placing the facade of the Church within the District and the remainder of the Church outside the District. The original church, erected in the 1860's, is also outside the boundary of the District. A true and correct copy of Ordinance Number 91-15 with the plat depicting the boundaries of the Historic District is attached as **Exhibit "B"** and incorporated herein for all purposes.

12. Saint Peter Church itself has not been designated as an historic landmark. The Archbishop did not oppose the inclusion of the facade in the Historic District. Based upon the representations of members of the Landmark Commission, the Planning and Zoning Commission, the City Council or members of their staffs at public hearings to consider enactment of the Ordinance designating the Historic District, and in correspondence related to the establishment of the Historic District, that only the facade of the Church inside the boundary of the Historic District would be protected from alteration and that the remainder of the property could be altered as the Archbishop and Saint Peter Church deemed necessary and advisable, and in reliance on such representations, Saint Peter Church expended large sums of money to finalize plans for the enlarging of the church building. These plans were submitted to the City on or about December 13, 1993. The plans call for the facade of Saint Peter Church inside the boundary of the Historic District to remain in place and unchanged. The renovations planned for Saint Peter Church will affect only those portions of the property which lie outside the boundary of the Historic District.

13. On or about December 13, 1993, the Archbishop, through his representative, requested a building permit from the City. The architectural plans and drawings submitted with the application require the demolition of the part of the Church outside the boundary of the Historic District. The Landmark Commission voted on February 15, 1994 to recommend that the City deny the building permit.

14. On February 17, 1994, the City Building Inspector, Ed Beasley, sent a letter to Mr. Gregory Davis, Davis-Rupe Architects, as representative of the Plaintiff, reporting the Landmark Commission's decision pertaining to the building permit application.

15. The changes required by the Historic Landmark Commission in the proposed plans specified that any new plans "shall not include demolition of the existing structure referred to as St. Peter's Church."

16. The Historic Landmark Commission offered to "work with" Plaintiff if Plaintiff submitted plans to build a new structure in the Historic District which would not include the demolition of the existing structure.

17. Plaintiff's representatives, the St. Peter Church Planning Committee members, Plaintiff's architect, Gregory Davis, or members of Defendant's staff had several meetings between February and April 1994 at which Plaintiff attempted to obtain guidance from Defendant as to specific changes which would be required for Plaintiff to obtain a building permit to enlarge St. Peter Church.

18. In accordance with suggestions put forth by some of Defendant's council members of staff at these meetings, Plaintiff's architect, Gregory Davis, revised his proposed plans to lower the roof line of the proposed church expansion by approximately three feet and to move the proposed new part of the structure back five feet.

19. These changes to the plans would have increased the costs of construction by at least $30,000.

20. On April 6, 1994, Plaintiff asked to be put on the City Council agenda for April 12, 1994 to appeal the decision of the Landmark Commission.

21. The proposed revised plans and the original plans were submitted to the City Council of the City of Boerne at a regular meeting on April 12, 1994, but the City Council voted to deny Plaintiff's appeal of the Landmark Commission's decision.

22. The St. Peter Church site owned by Plaintiff in Boerne is not suitable for building a new church, retaining the old church, and building or retaining the existing structures necessary to support the religious functions of the St. Peter Church parish.

23. An alternative design that recognizes the constraints of the terrain and pays due regard to the liturgical aspects of the Church would cost substantially more than the plans submitted to the building inspector for the City of Boerne and substantially more than the revised plans submitted to the City Council on April 12, 1994.

24. In recent years the Catholic Church has adopted numerous liturgical changes, some of which recommend that when new churches are constructed or existing churches substantially modified, the seating arrangements be configured around the altar, and this in turn dictates the shape of the sanctuary. The proposed renovation to the sanctuary of Saint Peter Church incorporates this liturgical change.

25. The present use of Saint Peter Church is as a parish church. The present building is not large enough to afford seating for those parishioners who come to

worship at regularly scheduled services. The mission of Saint Peter Church cannot be accomplished, nor can it survive as a parish church, without expansion to accommodate the regular attendance at its Sunday services.

26. Unless Plaintiff is permitted to enlarge St. Peter Church, the Church property will be unusable for its intended and present use, that is, as a parish church and for related parish structures and religious activities.

27. To stabilize and preserve the existing church (if a new church were constructed elsewhere), would require the expenditure of substantial parish funds for a non-religious purpose.

28. The proposed plans as submitted by the Plaintiff to the Defendant meet all fire, health and safety standards imposed by the City and by the State of Texas.

FIRST CAUSE OF ACTION

THE RELIGIOUS FREEDOM RESTORATION ACT

29. The Ordinance, as applied to Plaintiff, violates Section 3 of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, Pub. L. No. 103-141, 42 U.S.C. § 2000bb, et seq. (the "Act"), in that it "substantially burden(s) a person's exercise of religion." The denial by Defendant of Plaintiff's application for a building permit for the enlargement of the church imposes a significant burden on the free exercise of religion by preventing the parishioners of St. Peter Church from attending Mass in accordance with the tenets and teachings of the Catholic Church. The other burdens imposed upon the free exercise of religion include:

a. religious burdens:

(1) the inability to enlarge the church as necessary to accommodate the parishioners who seek to attend religious services;

(2) infringement on the associational rights of the members of Saint Peter Church to practice their religion as a religious community;

(3) the inability to use the 1923 structure as a sanctuary for Sunday mass due to its insufficient size;

(4) forcing Plaintiff to find an alternative site for religious worship;

(5) requiring Plaintiff to maintain a non-functional and too small structure which serves no use to Plaintiff;

(6) requiring Plaintiff to seek approval of a government body before altering the Church, whether or not the alteration is for religious purposes;

(7) controlling the belief and message as expressed through the Church building design and siting which are intended by Plaintiff to convey religious beliefs;

(8) imposing controls on the interior of the Church and the sanctuary so that it cannot be conformed to the liturgical recommendations of the Catholic Church by refusing to grant a building permit;

(9) taking of available building space for other parish development needs by forcing Plaintiff to maintain the 1923 church as a separate building;

(10) requiring or attempting to require inhospitable siting for the new church structure (which in this case particularly burdens more elderly or handicapped parishioners due to the steep terrain); and

b. financial burdens:

(1) maintenance of the 1923 church structure and repair of its structurally unsound elements;

(2) utility expenses for the 1923 church structure;

(3) increased construction costs through the design controls which will or could be imposed by the City; and

(4) the inclusion of the Church in the Historic District limits the market for Plaintiff's property to only those who can use a church structure and thereby substantially reduces the value of the Church property.

30. The City's interest in historic district preservation is not a compelling state interest within the meaning of the Act.

31. Even if the City's interest in historic district preservation were a compelling one, which it is not, the City's draconian method of furthering that interest, to wit, precluding Plaintiff from any alteration of the 1923 St. Peter Church, is not the least restrictive means of furthering the City's interest.

SECOND CAUSE OF ACTION

THE FREE EXERCISE OF RELIGION

32. The City's refusal to issue a building permit to Plaintiff as detailed in paragraphs 7-21 above violates the First Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment.

33. The Defendant's historic preservation ordinance 91-05, as amended by ordinances 91-15 and 94-17 (assuming, *arguendo,* that ordinance 94-17 applies in this case, which Plaintiff disputes) is neither a penal statute nor a valid and neutral law of general applicability within the meaning of Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Defendant contends that the historic district was created after making individualized assessments of the structures located upon each piece of property in the proposed district. Such an individualized determination cannot be said to create a neutral ordinance of general applicability.

34. The ordinance impermissibly burdens the free exercise of religion as set forth in paragraph 29 above.

35. This case presents a "hybrid" claim within the meaning of that phrase in Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) because:

(a) the free speech rights of the Plaintiff to express his religious beliefs through design and siting are infringed;

(b) the associational rights of the parishioners of St. Peter Church to assemble and communally worship in the exercise of their religion are infringed; and

(c) the involvement of the Defendant in the design of the new sanctuary impermissibly entangles the City in the internal affairs of the Plaintiff, and permits the City to pass judgment on and to dictate design elements which are either directly or indirectly religious in nature.

36. The requirement that St. Peter Church redesign its proposed enlargement of the Church to avoid demolition of the present structure imposes significant burdens on the free exercise of religion as are more fully set forth in paragraph 29 above.

37. The advancement of historic preservation is not a compelling state interest.

38. The actions of the City in denying the building permit and in requiring that no demolition of St. Peter Church take place in order to grant a building permit were not the least restrictive means of furthering the City's interest in the preservation of the historic district.

THIRD CAUSE OF ACTION

FREEDOM OF SPEECH AND ASSEMBLY

39. The actions of the City as alleged in paragraphs 7-21 violate the First Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment, in that they restrict freedom of expression and speech and infringe on the parishioners' rights to assemble to exercise their religious beliefs.

40. The Church building is an expression of Christian belief and message and conveying religious beliefs is a part of the Church's function. The control of the Church

exterior by the Defendant is a restriction on freedom of expression and speech.

41. The refusal of the Defendant to grant a permit for the enlargement of the Church necessarily imposes controls on the interior of the Church and the sanctuary so that it cannot be conformed to the liturgical recommendations of the Catholic Church, thereby imposing an additional restriction on freedom of expression and speech.

42. The associational rights of the members of Saint Peter Church exercised in furtherance of their First Amendment right to exercise their right of freedom of speech and of free exercise of religions are burdened by the City's refusal to permit Plaintiff to enlarge the Church to accommodate its parishioners.

43. The nature of the free speech expressed by the design of the St. Peter Church is religious in character, and merits a high degree of protection.

FOURTH CAUSE OF ACTION

THE HISTORIC DISTRICT DUE PROCESS & EQUAL PROTECTION

44. The City's refusal to grant a building permit to Plaintiff was unlawful and an impermissible exercise of the police power, and a violation of Plaintiff's rights under the due process and equal protection clauses of the Fifth Amendment to the United States Constitution for the following reasons:

a. The part of Saint Peter Church for which the building permit is sought is outside the boundary of the

Historic District and therefore, the City did not have the power under the Ordinance to deny the application.

b. The actions of the Defendant in designating the Historic District were arbitrary and unreasonable and therefore, not a valid exercise of the police power. Although the Ordinance purports to set out criteria and guidelines (which are themselves subjective and therefore invalid) the actual boundaries of the Historic District were arbitrarily created by drawing a line on a map one lot deep from Main Street.

c. The creation of the Historic District violates Local Government Code Section 211.004, which requires that all zoning regulations be adopted in accordance with "a comprehensive plan." The Ordinance directs the Landmark Commission to adopt a Preservation Plan to be included in the "comprehensive plan" for the City of Boerne. Although the City has "a comprehensive plan," the Landmark Commission failed to adopt a "preservation plan" to be included in the Boerne comprehensive plan before designating the Historic District. Therefore, the designations of historic landmarks and historic districts by the Landmark Commission are not supported by objective criteria and guidelines, but only by the subjective and arbitrary opinions of the members of the Landmark Commission. As such, the Ordinance reposes unchecked discretion in the members of the Landmark Commission.

d. In the absence of a preservation plan, the Landmark Commission exercises unbridled discretion and authority with respect to its descriptions of the

changes necessary before a building permit application can be approved.

e. The Ordinance vests in the building inspector the discretion to determine whether a building permit or a certificate of appropriateness is required, but it does not specify the criteria for making this determination. The Ordinance is thus vague and indefinite, as applied to Plaintiff.

f. The Ordinance is not intended to apply or by its terms cannot be applied to a Church for the following reasons:

(1) Section 3.1.4 of the Ordinance provides the preservation plan shall "suggest sources of funds for preservation and restoration activities and acquisitions, to include Federal sources, State sources, foundation sources, local private sources, as well as municipal assistance." The incentives thus provided for in this section of the Ordinance are for the most part not available to Plaintiff as Federal, State or municipal funding of Plaintiff for preservation and restoration is in violation of the First Amendment to the United States Constitution.

(2) Section 6 of the Ordinance provides in part "Nothing contained in this article or in the designation of a property as being in an historic district or historic landmark shall affect the present use of the property." The definition of USE in the zoning ordinance of the City of Boerne is: "the purpose for which land or structures thereon is designed, arranged, or intended to be occupied or used, or for which it is occupied, maintained, rented or leased." Saint Peter

Church is designed, arranged, occupied, maintained, and intended to be used as a parish church and for no other purpose, thus the landmark ordinance by its own terms cannot interfere with such use. The expansion of a parish church to accommodate a growing congregation in a burgeoning urban area is in pursuit and furtherance of its present use.

FIFTH CAUSE OF ACTION

UNCOMPENSATED TAKING OF PROPERTY AND INVERSE CONDEMNATION

45. The actions of the City as set forth in paragraphs 7-21 violate the Fifth Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment, in that they constitute the taking of private property without just compensation, as is more fully set forth below:

(a) The denial by the Defendant of the permit that would enable Plaintiff to enlarge the Church to accommodate the congregation prevents the Church from carrying out its purpose and constitutes a naked taking.

(b) The inclusion of the facade of Saint Peter Church in the Historic District and the design controls connected with that inclusion imposed a servitude on Plaintiff's property for the benefit of others who are not compelled to contribute to Plaintiff's increased costs and constitute a naked taking.

(c) The inclusion of the facade of Saint Peter Church in the Historic District limits the market for Plaintiff's property to only those who can use a church structure and thereby substantially reduces the value of the Church property.

SIXTH CAUSE OF ACTION

RELIGIOUS FREEDOM UNDER THE TEXAS CONSTITUTION

46. Plaintiff contends that the Defendant's ordinance, as applied to Plaintiff, is unconstitutional under both the United States Constitution and, as separate and independent grounds, under various provisions of the Constitution of the State of Texas.

47. The City's actions constitute a violation of the protection of the organic rights expressed in the Bill of Rights of the Texas Constitution and as specifically guaranteed by Article 1, Section 29.

48. The Ordinance as applied to Plaintiff violates Section 6 of Article 1 of the Texas Constitution, which provides:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as

may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

49. The Texas Bill of Rights provides different and substantially stronger protection of religious liberty than that afforded by the U.S. Constitution. The ordinance of the City, as applied to Plaintiff, interferes with and controls the rights of conscience in matters of religion and prevents, rather than protects, religious worship. The City's ordinance, as applied to Plaintiff, forces Plaintiff to support and maintain the 1923 St. Peter Church structure, and forces Plaintiff to erect a new church structure which suits the design and siting whims of the Landmark Commission and the Boerne city council.

50. The City's actions constitute a violation of the protection of freedom of religion as guaranteed by the provisions of Article I, Section 6 of the Texas Constitution. The plain reading of the religious freedom clause of the Texas Constitution shows that it affirmatively protects the rights of public worship, and requires the legislature to enact laws which protect that right.

SEVENTH CAUSE OF ACTION

TAKING OR DAMAGING OF PROPERTY WITHOUT DUE COURSE OF LAW

51. The actions of the City as set out in paragraphs 7-21 violate Sections 17 and 19 of Article 1 of the Texas Constitution, which prohibit the taking or damaging of private property without just or adequate compensation and without due course of law.

52. The ordinance as applied to Plaintiff constitutes an unconstitutional taking or damaging of Plaintiff's property without due course of law. The ordinance applies only to a designated area, lowers the value of Plaintiff's property, provides, as to Plaintiff, no compensating benefits such as tax abatement, and makes the property unusable for its present purposes as a parish church (in violation of the ordinance itself which provides that the ordinance shall not have any effect on preexisting uses). The refusal of the City to permit the enlargement of St. Peter Church deprives Plaintiff of all beneficial use of his property as it was intended to be and has been used since 1923. The ordinance imposes an impermissible servitude on Plaintiff's property, which damages its value and which was imposed without due course of law, as is more fully set forth in paragraph 44.

EIGHTH CAUSE OF ACTION

DECLARATORY JUDGMENT

53. The Archbishop requests a declaratory judgment, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., that the Ordinance as applied to Saint Peter Church is invalid, unconstitutional, null and void. Alternatively, Plaintiff requests a declaration under the Federal Declaratory Judgment Act that the ordinance, as applied to Saint Peter Church, affects only the facade of the church building and does not prohibit the demolition or the reconstruction of any other portion of the property.

NINTH CAUSE OF ACTION

ATTORNEYS' FEES

54. The Archbishop has been required to retain the undersigned attorneys to represent his interests in this action and has agreed to pay to said attorneys reasonable and necessary attorneys' fees. An award of reasonable and necessary attorneys' fees to Plaintiff is authorized by 42 U.S.C. § 1988 and by 28 U.S.C. § 2201 et seq.

STANDING

55. The Archbishop has exhausted the appellate procedure provided in the Ordinance; however, he is not required to exhaust any administrative remedies prior to bringing the instant civil action.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, P. F. Flores, Archbishop of the Catholic Archdiocese of San Antonio, prays that upon hearing of this cause, the Archbishop have:

a. Judgment declaring the actions of the City in denying a building permit for the enlargement of Saint Peter Church to be unconstitutional, invalid, null and void;

b. Judgment reversing the decision of the Landmark Commission and City Council of Boerne and directing the City's building inspector to issue the building permit applied for by the Archbishop on December 13, 1993.

c. Judgment enjoining the Defendant and its agents, attorneys, successors, and or assigns from enforcing or

attempting to enforce any City Ordinances concerning Historic District as to Saint Peter Church;

d. Judgment for reasonable and necessary attorneys' fees, together with costs of Court; and

e. Judgment for such other and further relief to which he may be justly entitled.

Respectfully submitted,

DROUGHT & PIPKIN, L.L.P.
2600 Weston Centre
112 East Pecan Street
San Antonio, Texas 78205
(210) 225-4031 Telephone
(210) 222-0586 Telecopier

By: /s/ Thomas Drought
Thomas Drought
State Bar No. 06136000
Patricia J. Schofield
State Bar No. 17800900

ATTORNEYS FOR
PLAINTIFF, P. F.
FLORES, ARCHBISHOP
OF SAN ANTONIO

EXHIBIT B

ORDINANCE NO. 91-15

AN ORDINANCE ADDING THE HISTORIC (OVERLAY) DISTRICT TO THE CITY OF BOERNE ZONING MAP (REVISED 1991);

WHEREAS, the legislature of the State of Texas has enacted Chapter 211. Municipal Zoning Authority," Local Government Code, empowering cities of the State of Texas to adopt regulations and restrictions for the preservation and protection of historical places and areas of historical and cultural importance and significance; and

WHEREAS, the City Council of Boerne is aware that the City of Boerne has various areas, places, buildings and structures having significant historical value which reflect the heritage of the state, and its people; and

WHEREAS, it is recognized that rapid change in population, economic functions and land use activities has led and is leading to the increased demolition of these landmarks so that the city, the state, and the nation are thereby losing a part of their heritage

WHEREAS, the City of Boerne Historic Landmark Commission and the City of Boerne Planning and Zoning Commission have recommended that a Historic District be designated;

NOW, THEREFORE, be it ordained by the City Council of the City of Boerne, Texas,

THAT, the City of Boerne, Texas, Zoning Districts map dated 1979, revised 9/91 be amended to include the Historic District as shown on the attached map.

READ and APPROVED on first reading this, the 10th day of December, 1991.

READ, APPROVED and ADOPTED on second reading this, the 14th day of January, 1992.

APPROVED:

/s/ Patrick Heath
Patrick Heath, Mayor

ATTEST:

/s/ Bernell Norton
Bernell Norton, City Secretary

[LOGO] **CITY OF BOERNE**
402 E. Blanco P.O. Box 1677
Boerne, Texas 78006-1677
(512) 249-9511 FAX (512) 249-9264

January 23, 1992

At the January 14th, 1992, City Council meeting the City Council passed on second reading the ordinance setting out the perimeter of the Historic District in the City of Boerne.

Now that the Historic District has been established, most changes to the facade of a structure facing a street (or new construction) must be reviewed by the Landmark Commission.

The contact person at the City for the review process is the building inspector. He will speak to property owners or review plans and determine whether or not the Landmark Commission needs to speak to the owner or review the plans. The Landmark Commission has indicated that they will react as quickly as possible to all requests but all meetings have to be posted for 72 hours (Open Meetings Act) so all of us are going to have to plan ahead so that projects proceed in a timely manner.

We have enclosed two items for your information; 1) a map of the boundaries, if your property/structure is not within the boundaries, then you are not included in the district, 2) some information we put together that we hope may provide a little background for you.

If you have any questions, please give me a call.

Sincerely,

/s/ Christopher A. Turk
Christopher A. Turk
Director of Planning & Community Services

CAT:pas

Enclosure

WHAT DO YOU MEAN, HISTORICAL?

WHY ME? WHAT HAVE WE DONE TO CAUSE THE CITY TO TELL US WHAT WE CAN DO WITH OUR PROPERTY? DO YOU KNOW HOW MUCH THIS WILL COST US?

SOUND FAMILIAR?

THESE ARE SOME OF THE QUESTIONS THAT PROPERTY OWNERS HAVE EXPRESSED TO THE LANDMARK COMMISSION ABOUT THE CREATION OF AN HISTORICAL DISTRICT. PERHAPS WE CAN ANSWER SOME OF THOSE QUESTIONS.

THE STRUCTURES IN THE PROPOSED DISTRICT (SEE MAP ATTACHED) ARE SPECIAL. FOR THE MOST PART THEY ARE OLD, THEY REFLECT WHAT LIFE IN BOERNE USED TO BE AND THE BUILDINGS CREATE AN ATMOSPHERE THAT REPRESENTS TO US AND VISITORS WHAT IS "BEST" ABOUT OUR COMMUNITY.

IT IS OUR RELIEF THAT THE BEST WAY TO INSURE THAT THE COMMUNITY DOES NOT LOSE

THIS PORTION OF THE HERITAGE THAT IS BOERNE, IS TO INCLUDE THOSE PROPERTIES IN A HISTORICAL ZONING DISTRICT. DON'T LET THE WORD "HISTORICAL" FOOL YA. THE STATE HISTORICAL COMMISSION HAS STATED THAT COMMUNITIES SHOULD CONSIDER PRESERVING STRUCTURES BUILT IN THE 1950'S LEST THEY JUST BECOME A MEMORY.

WHAT IS A HISTORIC DISTRICT?

A HISTORIC DISTRICT IS TECHNICALLY "OVERLAY ZONING." THAT MEANS THAT THE HISTORIC ZONING IS ADDED TO YOUR PRESENT ZONING WHETHER IT'S RESIDENTIAL, COMMERCIAL, OR INDUSTRIAL. THE "HISTORIC" DESIGNATION DOESN'T CHANGE THE USE OR ZONING OF YOUR PROPERTY, BUT IT DOES MEAN THAT ALL EXTERNAL CHANGES HAVE TO BE PLANNED AND REVIEWED.

WHO IS THE LANDMARK COMMISSION?

WELL, THE LANDMARK COMMISSION IS MADE UP OF NINE PEOPLE. SOME ARE DESIGN PROFESSIONALS AND SOME ARE JUST FOLKS WHO ARE KNOWLEDGEABLE IN THE FIELD OF HISTORIC PRESERVATION, EACH OF THESE PEOPLE HAS A DEEP INTEREST IN SEEING THAT OUR HISTORIC ARCHITECTURAL PAST IS NOT LOST. THEY HAVE BEEN APPOINTED BY THE CITY COUNCIL. THEY ARE ALSO RESPONSIBLE FOR REVIEWING ALL PROPOSED CHANGES OF ANY KIND IN HISTORIC AREAS AND DETERMINING WHETHER OR NOT THESE PROPOSED

CHANGES WILL FIT IN THE NEIGHBORHOOD. INCIDENTALLY, THEY SERVE WITHOUT PAY.

WHY SHOULD PROPOSED CHANGES BE REVIEWED?

REVIEW PROCEDURES REQUIRED BY HISTORIC ZONING ARE DESIGNED TO PROTECT PROPERTY OWNERS FROM LOSS DUE TO INAPPROPRIATE OR UNWANTED CHANGES AND DEVELOPMENT; SO THESE RESTRICTIONS ACTUALLY HELP KEEP THE NEIGHBORHOOD IN A GOOD STATE OF REPAIR BECAUSE THAT'S EXACTLY WHAT THEY WERE DESIGNED TO DO.

WHAT DO THEY REVIEW?

BASICALLY, THE COMMISSION REVIEWS ALL PROPOSED EXTERNAL CHANGES TO YOUR PROPERTY. THEY DO NOT REQUIRE YOU TO MAKE CHANGES, BUT WHEN YOU PROPOSE CHANGES THEY MUST BE REVIEWED, TO INCLUDE THE **COLOR** OF **PAINT.**

HERE ARE SOME RECOMMENDATIONS TAKEN FROM THE U.S. DEPARTMENT OF THE INTERIOR'S GUIDELINES FOR RENOVATION IN HISTORIC DISTRICTS THAT THE LANDMARK COMMISSION WILL FOLLOW ALSO.

RETAIN DISTINCTIVE FEATURES SUCH AS SIZE, SCALE, MASS, COLORS AND MATERIALS. THINGS LIKE ROOFS, PORCHES AND STAIRWAYS GIVE YOUR NEIGHBORHOOD ITS DISTINGUISHING CHARACTER.

RETAIN LANDSCAPE FEATURES SUCH AS PARKS, GARDENS, STREET LIGHTS, SIGNS BENCHES, WALKWAYS, ALLEYS AND BUILDING SETBACKS WHICH

HAVE TRADITIONALLY LINKED BUILDINGS TO THEIR ENVIRONMENT.

USE NEW MATERIALS WHICH ARE COMPATIBLE WITH THE CHARACTER OF YOUR NEIGHBORHOOD.

BASE YOUR RESTORATION IDEAS AND REMODELING DECISIONS ON ACTUAL KNOWLEDGE OF THE PAST. LOOK FOR OLD PHOTOGRAPHS AND DRAWINGS OF YOUR HOUSE OR OTHERS LIKE IT. GOOD RESOURCES ARE LOCAL LIBRARIES AND THE HISTORICAL SOCIETY.

REPAIR OR REPLACE DETERIORATED MATERIAL WITH NEW MATERIAL THAT DUPLICATES THE OLD AS CLOSELY AS POSSIBLE.

REPLACE MISSING ARCHITECTURAL FEATURES – CORNICES, BRACKETS, RAILINGS AND SHUTTERS.

DISCOVER ORIGINAL PAINT COLORS AND FINISHES AND REPAINT WITH AUTHENTIC COLORS WHEN APPROPRIATE.

PLACE TELEVISION ANTENNA AND MECHANICAL EQUIPMENT IN INCONSPICUOUS LOCATIONS.

INSTALL VERTICAL RUNS OF DUCTS, PIPES, AND CABLES IN CLOSETS, SERVICE ROOMS AND WALL CAVITIES.

COMPLY WITH CODE REQUIREMENTS IN SUCH A MANNER THAT THE ESSENTIAL CHARACTER OF YOUR BUILDING IS PRESERVED INTACT.

YOU WILL NOTICE THAT THESE SUGGESTIONS DO NOT REQUIRE YOU TO USE HISTORICAL MATERIALS SUCH AS ORIGINAL MORTAR, STONE, ETC.,

BUT THEY DO ASK THAT YOU CHOSE NEW MATERIAL THAT DUPLICATES THE OLD.

"MISTAKES" WHICH PROBABLY WILL NOT BE APPROVED BY THE BOARD:

- DON'T PAINT YOUR BUILDING – EVEN THE SAME COLOR – WITHOUT AUTHORIZATION FROM THE BOARD.
- DON'T INTRODUCE NEW CONSTRUCTION INTO NEIGHBORHOODS UNLESS USING A DESIGN WHICH IS COMPATIBLE WITH THE CHARACTER OF THE DISTRICT IN SIZE, SCALE, COLOR AND MATERIALS.
- DON'T DESTROY THE RELATIONSHIP OF BUILDINGS AND THEIR ENVIRONMENT BY INTRODUCING INAPPROPRIATELY LOCATED NEW PARKING LOTS.
- DON'T GIVE THE SITE AN APPEARANCE IT NEVER HAD.
- DON'T APPLY NEW MATERIAL WHICH IS INAPPROPRIATE OR WAS UNAVAILABLE WHEN THE BUILDING WAS CONSTRUCTED, SUCH AS:

  1. ARTIFICIAL BRICK SIDING
  2. ARTIFICIAL CAST STONE OR BRICK VENEER
  3. ASBESTOS OR ASPHALT SHINGLES
  4. PLASTIC OR ALUMINUM SIDING
  5. ALUMINUM STORM OR SCREEN WINDOW COMBINATIONS

6. UNDESIRABLE FENCING MATERIALS - CHAIN LINK, BAMBOO OR REED, PLYWOOD, MASONITE OR PARTICLEBOARD, ASBESTOS PANEL, CONCRETE OR CONCRETE BLOCK (UNLESS PLASTERED), GATES AND WALLS

- DON'T REMOVE ARCHITECTURAL FEATURES THAT ARE AN ESSENTIAL PART OF A BUILDING'S CHARACTER AND APPEARANCE, SUCH AS CORNICES, BRACKETS, RAILINGS, SHUTTERS, WINDOW ARCHITRAVES, AND DOORWAY PEDIMENTS.
- DON'T REPAINT WITH COLORS THAT ARE NOT APPROPRIATE TO THE BUILDING AND NEIGHBORHOOD.
- DON'T PLACE TELEVISION ANTENNA AND MECHANICAL EQUIPMENT, SUCH AS AIR CONDITIONERS, WHERE THEY CAN BE SEEN FROM THE STREET.
- DON'T INSTALL VERTICAL RUNS OF DUCTS, PIPES, AND CABLES IN PLACES WHERE THEY WILL BE A VISUAL INTRUSION.
- DON'T ATTACH EXTERIOR ELECTRICAL AND TELEPHONE CABLES TO THE PRINCIPAL ELEVATIONS OF THE BUILDING.

MORE ABOUT THE REVIEW PROCESS

THE REVIEW PROCESS BEGINS WITH THE CITY OF BOERNE BUILDING INSPECTOR'S OFFICE. THE BUILDING INSPECTOR WILL REVIEW THE PLANS OF PROPOSED EXTERNAL CHANGES AND NOTIFY THE

LANDMARK COMMISSION. THE LANDMARK COMMISSION WILL REVIEW THE PROPOSED PLANS AND APPROVE OR DISAPPROVE THEM

OUR ORDINANCE REQUIRES THAT TWO (2) COPIES OF DETAILED PLANS, ELEVATIONS, SPECIFICATIONS BE PRESENTED IF REQUIRED BY THE BUILDING INSPECTOR; i.e. ALTERATION OR REMOVAL OF ANY EXTERIOR ARCHITECTURAL FEATURE. THE COMMISSION WILL HAVE TO APPROVE OTHER IMPROVEMENTS SUCH AS COLOR, TEXTURE, MATERIAL USED IN REPAIR, REPAINTING OR MAINTENANCE.

DESIGN ANY SIGNS TO BE OF A SIZE, SCALE, HEIGHT, COLOR AND LOCATION WHICH ARE HARMONIOUS WITH ADJACENT PROPERTIES AND MATCH THE HISTORIC CHARACTERISTICS OF THE DISTRICT.

ALL GRAPHIC ELEMENTS SHOULD REINFORCE THE ARCHITECTURAL INTEGRITY OF YOUR BUILDING. SIGNS SHOULD NOT DISFIGURE OR CONCEAL ARCHITECTURAL FEATURES OR DETAILS AND SHOULD BE PROPERLY SCALED.

??? QUESTIONS ???

OVER THE COURSE OF THE LAST SEVERAL MONTHS OF PUBLIC HEARINGS, SOME INTERESTING QUESTION HAVE BEEN ASKED OF THE COMMISSION. BELOW WE HAVE A FEW OF THE MOST FREQUENTLY ASKED QUESTIONS AND THE COMMISSION'S RESPONSE TO THEM.

IF I OWN A PIECE OF PROPERTY WITHIN THE DISTRICT AND I WANT TO SELL IT, WHAT IMPACT WILL IT HAVE ON IT'S SALE?

When you purchase of own property within a designated historical district you have a guarantee that the area will remain harmonious with the ambiance of the community in which you purchased your property. If your family owned the property, you will be assured that no modern plastic and chrome building will be erected and lower the existing values. This preserves the integrity of the community, and one only has to look at other cities who have been successful in marketing themselves to realize what an atmosphere of historical integrity can do for a city.

WILL PROVIDING THE HISTORIC LANDMARK COMMISSION WITH MY PLANS CREATE A PROBLEM WITH MY TIMING IN GETTING THE WORK DONE?

Often unnecessary delays occur when a person is unaware of the need for review. The Commission and other City staff members who are part of the Historical Review Process will do everything possible to expedite approval. However, you as a property owner, can alleviate many unwarranted delays by being familiar with the guidelines.

WILL THE COMMISSION TRY TO MAKE ALL THE BUILDINGS LOOK ALIKE IF THEY ARE IN THE HISTORICAL DISTRICT?

The purpose is not to make everything look homogeneous, but to make things within the district boundaries "harmonious." This means that the district preserves the

look of buildings of each age of architectural development, with renovations appropriate to the era in which they were built.

BUILDING PERMIT APPLICATION
Jurisdiction of Boerne, Texas

JOB ADDRESS:
SOUTH MAIN – ST. PETER'S CATHOLIC CHURCH

LOT NO. 18, 19, 20, 16, 17, 21

BLOCK NO. _____

TRACT/SUBDIVISION _____

OWNER ARCHDIOCISE OF SAN ANTONIO

CONTRACTOR (NOT SELECTED)
ARCHITECT-DAVIS-RUPE ARCHITECTS

CONTRACTOR'S MAILING ADDRESS
11103 WEST AVE. SUITE 202
SAN ANTONIO, TEXAS (GREGORY DAVIS)
PHONE 210 377-3306
FAX: 377-3365

USE OF BUILDING:
_____ Residential
CHURCH Commercial

SQUARE FOOTAGE:
Living Area _____ Porches _____

Garage _____ Patio _____

CLASS OF WORK: ✓ New ✓ Addition _ Alteration
_ Fence _ Repair _ Move ✓ Demolish

DESCRIBE WORK EXPANSION OF ST. PETER'S CATHOLIC CHURCH AND RELATED SITE IMPROVEMENTS

* * *

*** NOTICE ***

NO PERMIT WILL BE ISSUED UNTIL THIS APPLICATION HAS BEEN FULLY COMPLETED AND A COMPLETE SET OF PLANS, INCLUDING A PLOT PLAN, HAS BEEN DELIVERED TO THE BUILDING OFFICIAL. THE GENERAL CONTRACTOR IS ULTIMATELY RESPONSIBLE FOR ENSURING THAT ALL PERMITS HAVE BEEN OBTAINED. NO CERTIFICATE OF OCCUPANCY WILL BE ISSUED UNTIL ALL PERMITS HAVE BEEN PAID FOR.

* * *

SIGNATURE OF APPLICANT
/s/ Gregory M. Davis – ARCHITECT

DATE REQUESTED DECEMBER 13, 1993

APPLICATION ACCEPTED BY _____

NOTE: PERMITS WILL BE READY WITHIN ONE (1) WORKING DAY OF APPLICATION. FAILURE TO OBTAIN A PERMIT BEFORE CONSTRUCTION WILL RESULT IN FEE BEING DOUBLED.

February 17, 1994

Hand Delivered

Mr. Ed Beasley
Building Inspector
City of Boerne
P. O. Box 1677
Boerne, Texas 78006-1677

Re: Building Permit Application submitted by Gregory Davis of Davis-Rupe Architects, representing the Archdiocese of San Antonio, for the "Expansion of St. Peter's Catholic Church and Related Site Improvements."

Dear Mr. Beasley:

Pursuant to Article VIII, Section 7, "Evaluation of Proposed Exterior Changes to Structures within a Historic District or Designated Historic Landmark," of the City of Boerne Zoning Ordinance, the Landmark Commission is advising you that the proposed work described in the aforementioned permit application will adversely affect the Historic District and is inappropriate or inconsistent with the spirit and purpose of Ordinance No. 91-05, and the Landmark Commission is advising you that the pending permit application submitted by the Archdiocese of San Antonio cannot be approved as submitted.

It is the finding of the Commission on February 15, 1994, that the partial demolition of the existing St. Peter's Church as described by an archdiocesan representative to the Commission at its meeting of February 1, 1994, is inconsistent and inappropriate.

For your information, the Landmark Commission, in making its recommendation to the City Planning and Zoning Commission regarding the creation of the Historic District, specifically identified St. Peter's Catholic Church and in support of the Church's preservation, cited the following criteria:

1. Character, interest or value as part of the development, heritage or cultural characteristics of the City.

3. Embodiment of distinguishing characteristics of an architectural type or specimen.

5. Unique location of singular physical characteristics representing an established and familiar visual feature of a neighborhood, community or the city.

6. Value as an aspect of community sentiment or public pride.

Due to the structure's historical importance to the community and our charge of protecting and preserving certain structures, areas, etc., deemed historical, any new plans shall not include demolition of the existing structure referred to as St. Peter's Catholic Church. Should the applicant wish to pursue construction of a new structure within the Historic District, that would not include the demolition of the existing structure, the Commission would be willing to work with the applicant within the framework of the ordinance.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

/s/ Phillip M. Bell
Phillip M. Bell
Chairman, Historic Landmark Commission
P. O. Box 775
Boerne, Texas 78006
210-249-2140

:pas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO	§	
vs.	§	CIVIL ACTION
	§	NO. SA94CA0421
THE CITY OF BOERNE	§	

AFFIDAVIT OF GREGORY M. DAVIS

My name is Gregory M. Davis. I am a registered architect in the firm of Davis, Durand-Hollis, Rupe, San Antonio, Texas, and I am the architect retained by Saint Peter Church in Boerne to prepare architectural plans for the proposed enlargement of Saint Peter Church. As the representative of P. F. Flores, Archbishop of San Antonio, I presented the plans to the Building Inspector of the City of Boerne for a building permit on December 13, 1993.

After the Landmark Commission recommended that the building permit be denied, I studied alternative plans for accomplishing the needed enlargement of the seating capacity of the Church. In reviewing these plans I considered suggestions offered to me by City Officials and members of the Boerne City Council for plans that might prove acceptable to the Landmark Commission and the City of Boerne.

In planning the enlargement of Saint Peter Church an architect must deal with constraints imposed by the terrain and by the need to preserve surrounding Church property for support buildings that must be constructed in the future (based on the master plan) to serve the

parish. It is my opinion that the alternative concepts produced as a result of my studies would cost substantially more to construct than the design I submitted to the Building Inspector for the City of Boerne on behalf of Archbishop Flores. It is my opinion that an alternative design that recognizes the constraints of the terrain and pays due regard to the liturgical aspects of the Church, that would not require demolition of the sanctuary of the Church, would cost approximately Five Hundred Thousand and No/100 Dollars ($500,000.00) more than the plans I submitted to the Building Inspector of the City of Boerne.

/s/ Gregory M. Davis
Gregory M. Davis

THE STATE OF TEXAS §
§
COUNTY OF BEXAR §

Sworn to and subscribed before me by said Gregory M. Davis, this the 10th day of November, 1994, to certify which witness my hand and seal of office.

(SEAL)
LINDARUTH SANDOVAL
MY COMMISSION
EXPIRES
June 22, 1996

/s/ Lindaruth Sandoval
Notary Public In and
For The State of Texas

/s/ Lindaruth Sandoval
(Notary's printed
name)

My Commission Expires:
6-22-96

AFFIDAVIT

STATE OF TEXAS

COUNTY OF GILLESPIE

BEFORE ME, the undersigned Notary Public, on this day personally appeared Stan Klein, known to me, and, after being duly sworn, stated that the following is within the knowledge of affiant and is true and correct to the best of his knowledge:

"My name is Stan Klein. I am a licensed architect practicing in the State of Texas. I hold a degree in architecture from The University of Texas at Austin. I am active in the practice of architecture, including the design of restoration and rehabilitation of historic structures and sites. I have read and evaluated the affidavit of Gregory M. Davis attached to the Motion for Summary Judgment. In addition, I have conferred with Mr. Davis concerning his design and have reviewed drawings and model prepared by Mr. Davis' firm. Pursuant to a request by the City of Boerne and Council for the City, I am currently involved in site studies to relocate the proposed building footprint on the existing site. That process is necessary to evaluate the costs of construction at a different location, preserving all or substantially all of the existing St. Peter Church.

"At this point in time, my conclusions are incomplete but my tentative analysis leads me to believe that if topography and soil conditions are the same throughout the site, then constructing a building of the same size as

the proposed project on another location at this site should not cost an additional $500,000.00.

One of the options to be considered is the City of Boerne's abandonment of a street right of way for additional parking or construction space, and the accommodations the City would be willing to make in terms of utilities or access."

"Based upon my brief evaluation of the site and the structure itself, its location, the City's historic preservation data and background material, it is my opinion as an architect that the St. Peter Church is a significant building. It is an example, of mission revival architecture. Mission revival architecture is especially significant to the community, since it shows the early awakening of the sense of history represented by the original spanish missions in San Antonio and South Texas, and an attempt to create a visible and aesthetic connection to that original history and culture, in the earlier years of this century. The profile of the siting of the church and its high visibility on a primary access route to the city makes it an especially significant structure within the City itself, coupled with the original church structure on the site, this building, considered along with the others identified within the historic district, is an essential part of recognizing, seeing, and understanding the original development and functioning of society in the City of Boerne. The loss of the building itself, or the attempted preservation of only a small remnant of the building, would destroy

the visible sense and impression of the history and culture that existed at the time of its construction."

/s/ Stan Klein
STAN KLEIN

SUBSCRIBED AND SWORN BEFORE ME on this 1st day of December, 1994, to certify which witness my hand and official seal.

(SEAL)
BARBARA SEGNER
Notary Public
STATE OF TEXAS

/s/ Barbara Segner
Notary Public, State of Texas

My Comm. Exp. 09/25/97

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO	§	**CIVIL ACTION NO. SA94CA0421**
v.	§	
THE CITY OF BOERNE	§	

FOURTH AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant, THE CITY OF BOERNE, and files this its Fourth Amended Original Answer to Plaintiff's Second Amended Complaint, and for such answer shows:

General Denial

1. Pursuant to Rules 8 and 11 of the Federal Rules of Civil Procedure, Defendant generally denies all material allegations contained in Plaintiff's Second Amended Complaint and calls upon the Plaintiff to prove said allegations by a preponderance of the evidence as required by the laws of the State of Texas.

Admissions and Denials

2. Defendant admits the allegations contained in Paragraphs 1, 2 and 3 of Plaintiff's Second Amended Complaint.

3. Although no Rule 8 response is necessary, Defendant admits the allegations contained in Paragraphs 4, 5

and 6 of Plaintiff's Second Amended Complaint and further says that venue is proper in the United States District Court for the Western District of Texas, San Antonio Division.

4. Based on the public records that it has reviewed, Defendant cannot admit or deny ownership as alleged in Paragraph 7. Defendant does not know if the Archbishop of San Antonio is the successor to the Archbishop of Galveston, who appears to be the record title holder to the property. Defendant admits that the church is used for the practice of religion, but does not know if the use is exclusive.

5. Defendant does not know, and has not attempted to determine whether or not changes in the scheduling and use of the St. Peter Church sanctuary could facilitate seating of all of its parishioners. The City assumes that the church has a need for additional space, and has assumed that evaluation of this issue would be problematic under the entanglement test of the First Amendment. The remaining allegations in paragraph 8 are admitted.

6. Defendant does not have enough detailed information to admit or deny the allegations of paragraph 9.

7. Under Paragraph 10 of Plaintiff's Second Amended Complaint, Defendant admits that on June 25, 1991, the City Council of the City of Boerne enacted Ordinance Number 91-05 and further admits that Exhibit "A" to Plaintiff's Second Amended Complaint is a true and correct copy of said Ordinance.

8. Under Paragraph 11, Defendant admits the substance of the ordinance and the attached map. Defendant

further admits that the mapped boundary bisects the church structure. Defendant denies that the Historic District includes only the facade of the Church. As further set forth below, Defendant contends that appropriate legal interpretation of the ordinance would include the entire structure. The remaining allegations in Paragraph 11 are admitted. Defendant further says that on July 26, 1988, the Historic Landmark Commission began exploring the creation of an Historic District. A public hearing to determine the Historic District boundary was first held by the Historic Landmark Commission on April 17, 1990.

9. Under Paragraph 12, Defendant admits that St. Peter Church has not been designated as an Historic Landmark, as that term is used in the City's Historic Preservation Ordinances, but would show that the property would be eligible for historic landmark designation under applicable Texas law. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that the Archbishop did not oppose the inclusion of the facade, or any other part of the church building, in the Historic District. Defendant admits that St. Peter Church expended a significant sum of money on plans to enlarge the church building. Defendant denies the remaining allegations contained in Paragraph 12 of Plaintiff's Second Amended Complaint.

10. Under Paragraph 13, Plaintiff says that on or about December 14, 1993, the City received a building permit application from Gregory Davis of Davis-Rupe Architects, representing the Archdiocese of San Antonio, for the "Expansion of St. Peter's Catholic Church and Related Site Improvements" proposing substantial destruction of the church. Defendant denies that the

church expansion requires the destruction of a part of the Church, and denies the claim that part of the building is not controlled by the ordinance. The remaining allegations contained in Paragraph 13 of Plaintiff's Second Amended Complaint are admitted.

11. Defendant admits the allegation of Paragraphs 14, 15, 16, 17, and 18 of the Plaintiff's Second Amended Complaint.

12. Defendant has insufficient information to admit or deny the allegations of Paragraph 19 of the Plaintiff's Second Amended Complaint.

13. Defendant admits the allegations of Paragraph 20 of the Plaintiff's Second Amended Complaint.

14. Defendant admits the allegations of Paragraph 21 of the Plaintiff's Second Amended Complaint.

15. Defendant denies the allegations of Paragraph 22 of the Plaintiff's Second Amended Complaint. Defendant will show that it is feasible for the St. Peter Church to build the structure that it needs or desires, while retaining and preserving the 1923 church structure.

16. Defendant denies the allegation in Paragraph 23 that alternative siting or location of the proposed church will necessarily cost substantially more than the plans submitted to the City. Defendant will show that several alternatives exist which will result in minimal additional costs. Other alternatives exists which would cost a greater amount of money, but would be offset by other advantages, including availability of additional space. Other alternatives also exist which would allow the same amount of space to be created for the church's activities

on the site, at a substantially lower cost than the estimate prepared by the Plaintiff's architect.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Plaintiff's Second Amended Complaint, however, Defendant has assumed that there are liturgical reasons for the internal design change and has not contested this allegation.

18. Defendant does not know if alternative utilization of the present building could accommodate and afford seating for all parishioners at regularly scheduling services. However, Defendant has assumed that the church's contention concerning the need for expansion and additional seating is valid. On this basis, the remaining allegations of Paragraph 25 are admitted.

19. Defendant does not know if alternative utilization of the present building could accommodate and afford seating for all parishioners at regularly scheduling services. However, Defendant has assumed that the church's contention concerning the need for expansion and additional seating is valid. On this basis, the remaining allegations of Paragraph 26 are admitted.

20. Defendant denies the allegations of Paragraph 27. The Defendant's ordinance does not limit the internal modification, remodeling, or alternative utilization of the 1923 church structure.

21. Defendant has insufficient information regarding the allegations in Paragraph 28, and has not made a

determination concerning code compliance as to the submitted plans. Defendant presently has no reason to deny the allegation.

22. Paragraph 29 sets forth the Plaintiff's legal conclusions concerning the alleged violation of the Religious Freedom Restoration Act ("RFRA"). Defendant denies that its ordinance is in violation of that act, which Defendant contends is unconstitutional. Defendant further specifically denies that the church is unable to enlarge its facility under the ordinance. Defendant denies that significant associational rights are infringed. Defendant denies that its ordinance forces the Plaintiff to find an alternative site, if that allegation means to a different parcel of property. Defendant denies that the approvals set forth in its ordinance are invalid, and would show that they are analogous to and consistent with land use approval regularly required of churches in the planning, plotting, and zoning process. Defendant would further show that no significant "particularized message" is involved in the siting of the church, or its exterior design, at least to the extent that such speech or expression, if present, are still permitted on the same parcel of property. Defendant denies that it imposes controls on the interior of the church under its ordinance. Defendant denies that the Free Exercise clause or the statute or the RFRA prevent historic preservation requirements for the 1923 church, which can still be utilized fully by interior remodeling or refurbishing for religious purposes. Defendant denies that the convenience of siting rises to the level of any constitutional magnitude. Defendant denies

that the financial burdens imposed constitute a "substantial burden" under established constitutional principles and standards.

23. Defendant denies the allegations in Paragraph 30, and would affirmatively state the City's interest in historic preservation is a compelling state interest within the context of this controversy, and the specific structure at issue in this case.

24. Defendant denies the allegations of Paragraph 31 of the Plaintiff's Second Amended Complaint. The City does not preclude the Plaintiff from any alternation of the 1923 St. Peter Church. The Defendant has only denied the request to demolish approximately 90 percent of the existing structure. Since the City's ordinance only applies to visible portions of the exterior of the church, it is the least restrictive means of furthering the City's interest.

25. Defendant denies the allegations in Paragraphs 32 through 38, setting forth the Plaintiff's legal conclusions concerning violation of the First Amendment Free Exercise clause. Defendant denies the claim that its statute is not a penal statute, or a valid or neutral law of general applicability. Defendant denies that the ordinance is an impermissible burden on the free exercise of religion, and would show that the ordinance does not substantially burden the exercise of religion by the St. Peter Catholic Church. Defendant denies that this case presents a hybrid claim, or that cognizable speech or associational rights are impaired. Defendant further denies that its ordinance, or the review and approval of proposed plans constitute impermissible or excessive entanglement in

church affairs or matters of religion. Defendant further denies the allegations in Paragraph 36 through 38 setting forth legal conclusions and would show that feasible alternatives exist which do not impose significant burdens. The City would show that as applied to this church structure, its interest is compelling. The City's ordinance seeks to apply the least restrictive means, by preserving only the visible exterior portion of the church building.

26. Defendant denies the conclusions set forth in Paragraphs 39 through 43 that free speech rights of the Plaintiff are violated by the City's ordinance. Defendant denies that any particularized message is conveyed which is subject to constitutional restriction. The City's ordinance does not impair or limit the associational rights of the members, since the right to expand and develop larger worship space remains.

27. Defendant denies the allegations in Paragraph 44 which conclude that due process and equal protection violations exist. Defendant denies that correct interpretation of the ordinance excludes any portion of the 1923 structure. Defendant denies that its delineation of the historic district was arbitrary and capricious. Defendant denies the claim that it does not have a preservation plan. Defendant would show that its ordinance and the associated materials represent the City's preservation plan. Defendant denies that its ordinance provides or contemplates unbridled discretion and authority. The ordinance sets forth specific criteria for evaluation. Defendant denies that its building inspector has unlimited or indefinite discretion with respect to application of the ordinance. Defendant further denies the ordinance

construction urged by the Plaintiff, which would exclude the church from its terms and conditions.

28. Defendant denies the conclusion alleged in Paragraph 45 that a taking or inverse condemnation has occurred. Full and free utilization of the Plaintiff's property for religious purposes still remains and exists, subject only to the limited restrictions set forth in the Defendant's ordinance. These restrictions do not meet the Fifth Amendment standard for a compensable taking or inverse condemnation.

29. Defendant denies the allegations in Paragraphs 46 through 50 concluding an alleged violation of the provisions of the Texas Constitution. Defendant denies that violations of Article 1, § 29 and Article 1, § 6 exist.

30. Defendant denies the allegations in Paragraphs 51 and 52 concluding that a taking or damaging of property results from the application of its ordinance under Article 1, §§ 17 and 19 of the Texas Constitution. Defendant's land use limitations on the Plaintiff's use of its property are reasonable restrictions in the exercise of its police power, and do not limit or deny the reasonable economically utilization of the Plaintiff's property to the point where compensation is required.

31. Defendant joins the Plaintiff in Paragraph 53 in seeking a declaratory judgment.

32. Insofar as a Rule 8 response is necessary, Defendant denies the allegations contained in Paragraph 54 of Plaintiff's Second Amended Complaint.

33. The City agrees that the Plaintiff has exhausted any necessary administrative remedies for the current

plan or proposal. To the extent that the Plaintiff has a legal right to proceed with its initial proposal under the theories alleged, the City agrees that the Plaintiff has standing, and that the case is ripe for review. To the extent that the Plaintiff's claim depend upon the actual denial of any reasonable use, or any feasible alternative which does not substantially burden the free exercise of religion, the City denies that this case is ripe for review, since no alternative designs have been presented to the building inspector, the Historic Landmark Commission or the City Council, in accordance with the terms and provisions of the ordinance.

34. Defendant denies the allegations in the Prayer for Relief contained in Plaintiff's Second Amended Complaint.

Additional and Affirmative Defenses

35. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) is unconstitutional. Defendant contends that the ordinance is constitutional and is consistent with the correct legal construction of the First and Fourteenth Amendments.

a. Defendant contends that this ordinance satisfies the free exercise clause under the First Amendment, and does not place an unlawful burden on the Plaintiff's religious exercise. Defendant contends that the ordinance meets the rational basis test which should properly be applicable to this penal ordinance of general applicability within the City's historic district.

b. In the alternative, if the court finds that strict scrutiny, and a compelling interest are required, Defendant contends that its Historic Preservation Ordinance, limited to a historic district, and applied in such a manner as to allow a full and continued use of the Plaintiff's property for existing and new structures for religious worship meet the applicable test.

c. Any effect on the church's value is incidental to the City's proper and lawful exercise of its police powers.

36. The city denies that Ordinance No. 91-05(7) (as amended by ordinance 94-17) violates the Freedom of Speech and Expression clause of the First Amendment.

a. The City's Historic Preservation Ordinance is not content based by any stretch of the imagination, and does not restrict the freedom of expression of the church with respect to construction upon its property.

b. The City's Historic Preservation Ordinance does not impose controls on the interior of the church. Development of the church, including the existing 1923 church structure are permitted and feasible, with or without demolition of portions of the existing structure, and could be permitted upon proper application to the City under the ordinance.

c. Once feasible alternatives are evaluated, it is apparent that any "expression" based aspects of the church's proposed new building can still exist on this same site.

d. There is no speech or expressive component, and no particularized message set forth in

the church's preference as to a site, location, or its building design, to the extent that it is still feasible and permitted on the site.

37. The City denies that the ordinance as applied is a Fifth Amendment taking. The ordinance regulates utilization of the church structure in order to accomplish historic preservation, and leaves the interior of the facility available for free utilization without restrictions or controls. It is still feasible to use the property to construct a free standing church of the same or similar design as proposed by Plaintiff. Upon a proper application, other structures or buildings could be attached or connected to the existing church, without destruction of the exterior portions of the building which are visible to public streets, further expanding utility and feasibility of use of the structure. These limitations do not constitute the level of impairment of value that create a taking under the Fifth Amendment.

38. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) violates applicable provisions of the Texas Constitution guaranteeing religious freedom.

39. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) violates applicable provisions of the Texas Constitution guaranteeing freedom of speech.

40. The City denies that the ordinance as applied to the Plaintiff violates article 1, § 17 of the Texas Constitution. The ordinance regulates private property, and is a valid exercise of the City's police powers under established Texas law. The City's regulations do not impair the

feasibility of the continued use of the church structure for worship, education, or any other form of religious expression and activity. The ordinance does not impair the feasibility of use of the existing structure in connection with or as a part of additional buildings or structures necessary for the growth of the church and its congregation.

41. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) violates § 3 of the Religious Freedom Restoration Act of 1993. The City contends that this statute is an impermissible attempt by Congress to modify the meaning and interpretation of the constitution, as established by the Supreme Court. Congress has no constitutional authority to modify or change the interpretation of the United States Constitution which is applicable to the states under the Fourteenth Amendment. For this reason, any interpretation or application of the Religious Freedom Restoration Act of 1993 which imposes a statutory revision in the applicable standards of First Amendment jurisprudence is not valid, taking into account the operative provisions of Article III, the Free Exercise clause of the First Amendment, Section 5 of the Fourteenth Amendment, and the Tenth Amendment.

42. If the RFRA is unconstitutional, the City says that its historic preservation ordinance is a penal statute of general and neutral applicability, and that it should properly be subject to the standards of review set forth in Employers Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), as such, the Court's analysis does not require that strict scrutiny of the ordinance be employed, or that a compelling interest be found for any effects upon religious activities and

practices. The St. Peter Church is in no different position than any other property owner in the City of Boerne, and has not been regulated or treated differently in any respect on the basis of its religious beliefs or practices.

43. If the Court upholds the RFRA, the City says that historic preservation can be a compelling interest in a "free exercise" context. The Court must balance the burden imposed, with the public objective sought to be obtained. The 1923 St. Peter Church building has historic significance, and is an important and readily recognized feature of the public image and character for the City of Boerne. The 1923 church, in conjunction with the 1867 original sanctuary building, clearly has historic significance. Its prominence in location and the history of the community, makes the preservation of all or part of this structure a compelling local interest.

44. Because of the feasibility of alternative site locations, and the potential for the church's chosen design to be constructed elsewhere on the site, together with the relative magnitude of the additional costs which may or may not be involved, the Court finds that there is not a significant burden on the free exercise of religion imposed by the City of Boerne historic preservation ordinance for this particular site.

45. The object of historical preservation, limited by proper construction of the ordinance itself, is inherently the least restrictive means available for the accomplishment of the objective. The City has made a determination of the historical value of this structure which is supported by the legislative record. The only way to accomplish the objective of preservation is to preserve the

portions of the structure that have visibility and direct impact on the community. The City's own reading of its ordinance is limited to the portions of the structure which are visible from the City's public thorough fares. Since the ordinance does not limit the internal change, modification, or utilization of the structure, and allows the portions of the structure which are not readily visible to the public to be utilized in whatever manner the owner sees fit.

46. The City denies that its refusal to grant a building permit is unlawful or impermissible. The City contends that its actions were consistent with the due process clauses of the U.S. and Texas Constitutions.

a. The actions of the Defendant meet the rational basis test, and demonstrate a legally sufficient basis for legislative action. In the alternative, if a compelling interest is required, the City contends that a compelling interest exists in the context of this particular structure in the City of Boerne, Texas, for the purpose of historical preservation.

b. The clerical errors complained of concerning citations to the City's authority are wholly irrelevant, as the City clearly has the zoning and land use authority to pass and adopt the ordinance under the provisions of Texas law.

c. The adoption of the City's Historic Preservation Ordinance is consistent with the requirement for a comprehensive plan. The City of Boerne has a comprehensive plan, in the process of studying and evaluating the Historic Preservation Ordinance since 1979, together with the collected materials which

were part of the recommendation and presentation by the Landmark Commission and the Planning and Zoning Commission are correctly interpreted as a matter of law to be the "preservation plan" of the City, to the extent that such a plan is a technical requirement of state law or the ordinance itself.

d. The City contends that its building inspector acted in a timely fashion, considering the necessary and legal interpretation of the ordinance prior to his action. The City further contends that the time periods in the ordinance are directory, and not mandatory.

e. The City contends that the correct construction of § 3.1.4 of the ordinance does not accept or excuse non-compliance by the Plaintiff. The incentives provided in this section are not legally necessary, nor are they required as a pre-condition to the regulations in the ordinance.

f. The City contends that § 6 of the ordinance as properly interpreted allows the current use of the property, and the continuing occupation, maintenance, and use of the church, as an independent sanctuary, as a religious educational space, or as a part of a larger structure, properly designed and permitted, which does not destroy or demolish the visible portions of the exterior of the church.

47. The City's ordinance causes no injury to the associational interest of the Plaintiff or the congregation members virtually represented by the Plaintiff. Since it is feasible for the church to conduct its worship activities within an enlarged new congressional worship space, the

associational freedoms of the congregation members are preserved, and are not burden or impaired under the City's ordinance.

48. There is no unlawful or excessive entanglement of the government and religious affairs under the provisions of the City's ordinance. The City has merely rejected a proposal or plan which clearly envisioned destruction of visible portions of the 1923 church structure. That destruction was prohibited by the ordinance, and rejection of that plan was appropriate by the City commissions and boards charged with the responsibility for review and approval or denial. The government's willingness to consider alternatives, and to communicate with constituents about the interpretation and application of its ordinances, does not result in unconstitutional entanglement.

49. Defendant asserts the well-established law in Texas that a City acts only by and through the official actions of the governing body as evidenced by authenticated minutes, ordinances and resolutions, and that the statements, acts or promises of the mayor, council members, or other municipal officers and employees are ineffectual.

50. Defendant says that the building permit application from Gregory Davis of Davis-Rupe Architects, representing the Archdiocese of San Antonio, is for proposed construction on Lots 16, 17, 18, 19, 20 and 21, Kernaghan Addition. The Archbishop of San Antonio is the owner of record title to those lots. However, no portion of the existing church building of St. Peter Catholic Church lies

on the referenced lots. The referenced lots lie outside the boundaries of the Historic District.

51. Defendant says that the owner of record title to the building and appurtenant land described in Plaintiff's Second Amended Compliant as an "UN-NUMBERED TRACT OUT OF THE KERNAGHAN ADDITION," is the Roman Catholic Bishop of Galveston. The existing church building of St. Peter Catholic Church lies wholly within that tract.

DESIGNATION OF ATTORNEY-IN-CHARGE

52. Lowell F. Denton of Denton, McKamie & Navarro, A Professional Corporation, shall serve as attorney-in-charge for Defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiff's claims be denied in their entirety, that Defendant recover from Plaintiff its reasonable and necessary attorney's fees for defense of this cause, and for such other and further relief to which this Court may deem Defendant justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon the below named individuals in the specified manner and according to the Federal Rules of Civil Procedure on the 10th day of _____ March, 1995.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES,
ARCHBISHOP OF
SAN ANTONIO

CIVIL ACTION
NO. SA94CA0421

V.

THE CITY OF BOERNE

EXHIBIT 5-PTO
STIPULATED FACTS

The stipulated facts listed below are drawn from the pleadings and discovery materials in this case.

a. Ordinance Number 85-11 of the City of Boerne, dated May 20, 1985, authorized the creation of a Landmark Commission.

b. The Landmark Commission for the City of Boerne was appointed on November 10, 1987.

c. On February 16, 1988, the Landmark Commission began exploring the creation of an historic district in the City of Boerne.

d. On March 1, 1988; March 29, 1988; May 4, 1988; August 8, 1988; February 20, 1990; March 13, 1990; April 17, 1990; May 29, 1990; October 10, 1990; February 16, 1991; and September 16, 1991, meetings of the Landmark Commission were held to discuss the historic district boundaries.

e. Ordinance Number 89-04, dated July 25, 1989 amended Ordinance Number 85-11.

f. On April 17, 1990; May 29, 1990; and October 10, 1990 public hearings of the Landmark Commission were held to discuss and determine the historic district boundaries. Notices of these public hearings were duly posted in advance at City Hall.

g. On October 1, 1991, the Historic Landmark Commission recommendation for creation of the historic district was presented to the Planning and Zoning Commission.

h. In December 1990, Plaintiff authorized Father Anthony Cummins, the parish priest of St. Peter Church, to begin planning to enlarge the church to enable the congregation to attend services and other religious functions.

i. Plaintiff is the Roman Catholic Archbishop of San Antonio.

j. Ordinance Number 91-05, dated June 25, 1991 amended and superseded Ordinance Number 89-04.

k. On December 14, 1993, a building permit application was submitted on behalf of the Archdiocese of San Antonio for the "expansion of Saint Peter's Church and related site improvements."

l. The criteria used to determine the historical significance of a property is listed in Section 6.1 of Ordinance Number 91-05. Identical criteria was contained in Section 5A of Ordinance Number 89-04.

m. Saint Peter Church and its related site improvements are used for the practice of religion.

n. The Saint Peter Church occupies 5.526 acres of land more or less, of which only a portion is presently occupied by existing structures.

o. The population of the City of Boerne and the Catholic congregation served by Saint Peter Church has greatly increased since 1923.

p. Saint Peter Church is used for the practice of religion.

q. In March of 1991, Father Cummins appointed certain parishioners to a planning committee to discuss the feasibility of enlarging the existing church building to afford seating space for parishioners at regular services.

r. Ordinance No. 91-15, dated January 14, 1992, added the Historic (Overlay) District to the City of Boerne Zoning Map (Revised 1991).

s. The Plat, listed as Defendant's Exhibit "D-40" depicts the boundaries of the historic district adopted by the City Council in January of 1992. The boundary lines shown on the plat of the historic district bisects the structure currently used as the sanctuary for Saint Peter Church.

t. Saint Peter Church is not an "historic landmark" as that term is defined in Ordinance Number 91-05.

u. On February 1, 1994, the Landmark Commission considered the application for building permit. That meeting was recessed and continued on February 15, 1994.

v. On February 15, 1994, the Landmark Commission conducted a public hearing and considered the application for a building permit of Saint Peter Church. The Landmark Commission

found that the proposed plan would adversely affect the historic district and is inappropriate or inconsistent with the spirit and purposes of Ordinance Number 91-05, and the Landmark Commission advised the City Building Inspector that the pending permit application cannot be approved until certain changes to the permit application are made.

w. On February 17, 1994, the City Building Inspector, Ed Beasley, sent a letter to Mr. Gregory Davis, Davis-Rupe Architects, as representative of the Archdiocese of San Antonio, advising of the Landmark Commission's decision pertaining to the building permit application.

x. On April 6, 1994, Saint Peter Church requested to be put on the City Council agenda for April 12, 1994 to appeal the decision of the Landmark Commission.

y. After due notice and a public hearing, the City Council of the City of Boerne voted at a regular meeting on April 12, 1994 to deny the appeal of Saint Peter Church concerning the building permit application.

z. As a part of the Landmark Commission evaluation an inventory was conducted of the historical resources in the community. A document evaluating the historic significance of those structures, including both of the church structures known as the Saint Peter Church, are included in that inventory. The Landmark Commission identified both structures as meeting several of the criteria for historic classification.

aa. On or about November 20, 1991, written notice of the December 3, 1991 hearing of the Planning and Zoning Commission and City Council for

the creation of the historic district in the City of Boerne was given to Plaintiff.

bb. Representatives of both parties held subsequent meetings to consider and evaluate alternative locations and designs, which would preserve the 1923 church structure.

cc. Representatives of both parties have actively considered alternative site designs, but have been unable to reach a consensus or agreement on a proposal does not demolish all or a substantial portion of the 1923 church structure.

dd. As a part of the Landmark Commission evaluation, an inventory was conducted of the historical resources in the community. A document evaluating the historic significance of those structures, including both of the church structures known as the Saint Peter Church, are included in that inventory. Both structures were identified as meeting several of the criteria for historic classification.

ee. On or about November 20, 1991, written notice of the December 3, 1991 hearing of the Planning and Zoning Commission and City Council for the creation of the historic district in the city of Boerne was given to Plaintiff.

ff. The building permit application filed by the Plaintiff specifically references lots 16, 17, 18, 19, 20 and 21. The 1923 church structure is not located on these lots. The site plan drawings filed with the application show the location of the church and reference its location.

gg. The City's historic preservation ordinance was amended in October 1994 by ordinance no. 94-17, which made several changes and

redefined the historic district to include the entire 1923 church structure.

hh. Action was taken within forty-five days after the application was received by the Chairman of the Landmark Commission.

ii. The City of Boerne, Texas enacted a non-binding resolution on January 31, 1995 proposing to close a portion of Kronkosky St. in order to facilitate the construction of a new church building, without destruction of the 1923 church structure.

jj. The Saint Peter Church occupies 5.526 acres of land more or less, of which only a portion is presently occupied by existing structures. It is a matter of dispute whether the two sanctuary buildings on the site have historical significance. The other structures on the site have no historical significance, and little if any architectural significance.

kk. The title to the land on which St. Peter Church is situated is in the name of Right Reverend Claudius M. Dubuis, Roman Catholic Bishop of the Diocese of Galveston, and his successors and all subsequent successors.

ll. Plaintiff, P.F. Flores, Archbishop of San Antonio, is the subsequent successor of Bishop Dubuis, and holder of record title to the property on which the 1923 sanctuary is located.

mm. The changes to the permit application which the Landmark Commission decision required that "any new plans shall not include demolition of the existing structure referred to as St. Peter's Catholic Church." The Landmark Commission offered to "work with" Plaintiff if

Plaintiff wished to pursue construction of a new structure in the historic district.

nn. The congregation and parish of the Saint Peter Church occupies 5.526 acres of land, more or less, of which only a portion is presently occupied by existing structures. There are two church sanctuaries on the property, constructed in 1867 and 1923. Both parties agree that the 1867 church structure has historical significance. The parties disagree about the historical significance of the 1923 building. Both parties agree that the other structures on the site have no historic significance, and little if any architectural significance.

oo. The Roman Catholic Church is parish-based, such that Catholics are encouraged to attend church in their own parish and to be active in parish affairs.

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO V. THE CITY OF BOERNE	SA-94-CA-0421

ORDER

(Filed Mar. 16, 1995)

Pursuant to the Court's February 3, 1995 Certification Order, it has provided the United States the right to intervene in the above-captioned action in order to defend the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. On March 6, 1995, the United States notified the Court that it elected to intervene in order to defend the constitutionality of the Religious Freedom Restoration Act and filed a brief on the issue on the same day. Accordingly,

IT IS HEREBY ORDERED that the United States is granted leave to intervene in this action.

SIGNED this 13th day of March, 1995.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D.
BUNTON III
SENIOR DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-00067
USDC No. SA-94-CA-0421

P.F. FLORES, ARCHBISHOP
OF SAN ANTONIO,

Plaintiff-Petitioner,

and

UNITED STATES OF AMERICA,

Movant-Petitioner,

versus

CITY OF BOERNE,

Defendant-Respondent.

Petitions for Leave to Appeal
an Interlocutory Order

(Filed May 9, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

BY THE COURT:

ORDER
No. 95-00067

When a district court certifies an order pursuant to 28 U.S.C. § 1292(b) in which a Fed. R. Civ. P. 54(b) certification is more appropriate, we view the certification as

brought pursuant to Rule 54(b). See DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1032 (5th Cir. 1982). By holding the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb through 2000bb-4, unconstitutional, the district court effectively eliminated the first cause of action of P.F. Flores, the Archbishop of San Antonio, Texas.

"It is settled that Rule 54(b) is limited to orders that would be 'final' if entered in a simple single-claim, two-party case." DeMelo, 677 F.2d at 1032. "[W]hen the facts give rise to more than one legal right or cause of action, and the two grounds of recovery are not mutually exclusive, there are multiple claims which can be separately appealed upon certification under Rule 54(b)." H & W Indus., Inc. v. Formosa Plastics Corp., USA, 860 F.2d 172, 176 (5th Cir. 1988). Therefore, IT IS ORDERED that the appeal is GRANTED pursuant to Rule 54(b).

IT IS FURTHER ORDERED that the expedited briefing schedule as proposed in the government's motion to amend briefing schedule filed April 14, 1995 is GRANTED. The request by the City of Boerne, Texas, for this court to certify to the Supreme Court the legal question of the constitutionality of RFRA, see 28 U.S.C. § 1254(2), will be considered by this court after the parties have filed their briefs.

[initialed at bottom of first page]

RHB 4/22/95 EJH 5/2 FPB 5-5-95

Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

No. 95-2074

(9)

In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

versus

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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42 pp

QUESTIONS PRESENTED

1. Whether Congress violated the separation of powers doctrine by legislatively overruling a Supreme Court determination of the scope of the Free Exercise Clause of the First Amendment.

2. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

3. Whether *Katzenbach v. Morgan*, 384 U.S. 641 (1966), should be overruled in part.

4. Whether Congress violated the Establishment Clause of the First Amendment by broadly and exclusively privileging religion over other expressions of conscience.

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OPINIONS BELOW

Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *reprinted in* Cert. Pet. App.[1] at 24a-29a; *Flores v. City of Boerne, Texas*, 73 F.3d 1352 (5th Cir. 1996), *reprinted in* Cert. Pet. App. at 1a-23a. Order Granting United States Leave to Intervene, March 13, 1995, *reprinted in* Cert. Pet. App. at 32a; Petition for Leave to Appeal an Interlocutory Order, granted May 9, 1995, *reprinted in* Jt. App. at 74; Order Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, denied March 28, 1996, *reprinted in* Cert. Pet. App. at 30a.

JURISDICTION

The Fifth Circuit decision was reached on January 23, 1996; the petition for rehearing en banc, which was treated by the Fifth Circuit as a petition for rehearing, was denied on March 28, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb1-4 (1993), *reprinted in* Cert. Pet. App. at 39a-42a; U.S. Constitution, Article III, § 1, *reprinted in* Cert. Pet. App. at 35a; Amendment XIV, §§ 1, 5, *reprinted in* Cert. Pet. App. at 36a-38a; Amendment I, clauses 1, 2, *reprinted*

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[1] Pages in the Appendix to the Petition for Writ of Certiorari are cited as Cert. Pet. App. Pages in the Joint Appendix to the Petitioner's Brief on the Merits are cited as Jt. App.

in Cert. Pet. App. at 36a; Amendment X, *reprinted in* Cert. Pet. App. at 36a.

STATEMENT OF THE CASE

1. *Facts.* This case is about a request to tear down a beautiful stone church, whose times and memories are graven into the souls of a city. While the issue of the church's precise historical value is a matter that has been left to trial, Jt. App. at 72, the City maintains that St. Peter Church, which was built in 1923, is a striking example of mission revival architecture self-consciously referring back to the original Spanish missions in South Texas. As one arrives in the City of Boerne, Texas, this highly visible church set on a hill speaks directly of the history of this City and its people. Klein Affidavit, Jt. App. at 43. The people of the City seek to preserve their community's shared history as reflected in this familiar mission revival structure. *Id.*

With Ordinance 91-05, the City of Boerne enacted a historic preservation law intended to preserve and protect its rich history and culture. Recognizing that "rapid change in population, economic functions and land use activities" has threatened the distinctive historical character of its community, the City Council of Boerne passed its historic landmark preservation law for the following purposes:

> (1) "To protect, enhance, and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's and State's architectural, archeological, cultural, social, economic, ethnic and political history . . . . "

(2) "To safeguard the City's historic and cultural heritage . . . . "

(3) "To stabilize and improve property values in such locations."

(4) "To foster civic pride in the beauty and accomplishments of the past."

(5) "To protect and enhance the City's attractions to tourists and visitors and provide incidental support and stimulus to business and industry."

(6) "To strengthen the economy of the City."

(7) "To promote the use of historic landmarks for the culture, prosperity, education and general welfare of the people of the City and visitors to the City."

Cert. Pet. App. at 46a-48a.

Boerne's historic preservation law represents years of effort on the part of the City and evidences the citizens' commitment to their community's heritage. On May 20, 1985, the City Council duly enacted Ordinance No. 85-11, which authorized the creation of a Landmark Commission. Jt. App. at 66. The Landmark Commission was appointed on November 10, 1987, began to explore the creation of a historic district on February 16, 1988, and held numerous meetings to discuss the historic district boundaries. *Id.* Three public hearings were held in 1990 to discuss and determine the historic district boundaries. *Id.*

Ordinance 91-05, which was enacted into law on June 25, 1991, codifies the City's historical preservation policy goals; defines "historic landmark" and "historic district";

appoints and designates procedures for a "Historic Landmark Commission"; orders the Commission to prepare a landmark preservation plan; and designates procedures for the following: the acquisition and removal of historic landmark designation, the creation of historic districts, the evaluation of proposed exterior changes to structures within a historical district or a designated historic landmark, and the acquisition of a historic structure preservation tax exemption. Cert. Pet. App. at 46a-63a. Pursuant to Ordinance 91-05, the Historic Landmark Commission presented its recommendation for creation of the historic district to the Planning and Zoning Commission on October 1, 1991. Jt. App. at 67.

Respondent Flores was given notice of the December 3, 1991 hearing of the Planning and Zoning Commission and City Council for the creation of the historic district. Jt. App. at 69. Subsequently, Ordinance 91-15 added the historic overlay district to the City of Boerne zoning map on January 14, 1992. Jt. App. at 68. Ordinance 91-15 states that rapid changes in the local population, economy, and land use have led to the demolition of historical structures that "reflect the heritage of the state, and its people . . . so that the city, the state, and the nation are thereby losing a part of their heritage." Jt. App. at 24.

There is no dispute that the City's historic preservation ordinance covers at the least a substantial portion of the church. *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996).

On December 14, 1993, a building permit application was submitted on behalf of Respondent Flores for the purpose of demolishing and expanding St. Peter Church. Jt. App. at 67. A public hearing was held by the Landmark Commission to consider the application. Upon its

determination that the proposed plan will adversely affect the historic district and is inappropriate or inconsistent with the spirit and purposes of Ordinance 91-05, the Landmark Commission advised the City Building Inspector, Mr. Ed Beasley, that the permit could not be approved until certain changes to the application were made. Jt. App. at 68-69. The letter stated that the Landmark Commission had employed the following criteria, which are taken from Sec. 6.1 of Ordinance 91-05, to determine that the application violated the ordinance:

1. Character, interest or value as part of the development, heritage or cultural characteristics of the City.

3. Embodiment of distinguishing characteristics of an architectural type or specimen.

5. Unique location of singular physical characteristics representing an established and familiar visual feature of a neighborhood, community or the City.

6. Value as an aspect of community sentiment or public pride.

The letter further stated: "Due to the structure's historical importance to the community and our charge of protecting and preserving certain structures, areas, etc., deemed historical, any new plans shall not include demolition of the existing structure referred to as St. Peter's Catholic Church." Jt. App. at 39a. The City Building Inspector sent a letter to Respondent's architect, Mr. Gregory Davis, confirming the denial of the permit by the Landmark Commission. Jt. App. at 60a.

Pursuant to Ordinance 91-05, Respondent Flores appealed the Landmark Commission's decision to the City Council. After notice and a public hearing, the City

Council voted to deny Respondent's appeal. Jt. App. at 69. Representatives of both parties have considered alternative site designs but have been unable to reach an agreement. Jt. App. at 70. Respondent Flores filed this suit, pursuant to 28 U.S.C. § 1331, alleging *inter alia* that Ordinance 91-05 violates the Religious Freedom Restoration Act ("RFRA" or "the Act"), 42 U.S.C. § 2000bb (1993).

2. *The District Court.* Following certification of the question of RFRA's constitutionality pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States, intervention of the United States, and briefing on the constitutional issue by all parties, the district court ruled that RFRA was facially invalid because "Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA," *Flores v. City of Boerne*, 877 F. Supp. 355, 357 (W. D. Tex. 1995), and therefore infringed on the long-settled authority of the courts " 'to say what the law is.' " *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The court noted Congress's power under Section 5 of the Fourteenth Amendment, but did not find it a persuasive basis for congressional authority in light of "Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary." *Flores*, 877 F. Supp. at 357.

The district court certified its order for interlocutory appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b). Cert. Pet. App. at 29a. Respondent Flores and the United States appealed the district court's decision. The court of appeals accepted the appeal, treating it as a Fed. R. Civ. P. 54(b) partial final judgment. Jt. App. at 73.

3. *The Court of Appeals.* The court of appeals reversed on four grounds. First, the court held that Congress acted within its power under Section 5 of the Fourteenth Amendment on the theory that RFRA is remedial because it prohibits "budding or disguised constitutional violations," "sprouting constitutional violations," and "incipient constitutional violations." *Flores*, 73 F.3d at 1359-60. The court applied the three-part test found in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The Fifth Circuit found that RFRA "may be regarded" as an enactment to enforce the Fourteenth Amendment, which incorporates the First Amendment. In support of its conclusion that RFRA enforces the First Amendment's prohibitions against the states, the court cited legislative history regarding the "need for legislation to defend individuals, particularly those from minority religions, from generally applicable laws that burden the exercise of religion." *Flores*, 73 F.3d at 1359.

The court then stated that RFRA is "plainly adapted to [the end of the First Amendment.]" *Flores*, 73 F.3d at 1360. The court agreed with the United States' argument that "even if the Constitution only prohibits governmental action taken with the intent of interfering with religious exercise, Congress may go farther, as it did with RFRA, and prohibit conduct that has the effect of burdening the exercise of religion" on the ground that this Court had held in *City of Rome v. United States*, 446 U.S. 156, 177 (1980), that Congress may "prohibit laws with a racially

discriminatory effect . . . as an appropriate method of promoting the Amendment's purpose, even if the Constitution only prohibits laws with a racially discriminatory intent." *Flores*, 73 F.3d at 1360. Further, the court reasoned, RFRA could be justified as an attempt to protect religious minorities, and that Congress "could reasonably conclude" that minority religions would be at a disadvantage in obtaining religious exemptions. *Id.*

The Fifth Circuit ruled that the third prong of the *M'Culloch* test, whether RFRA is consistent "with the letter and spirit of the constitution," was satisfied because RFRA did not violate the separation of powers, the Establishment Clause, or the Tenth Amendment.

Second, the court addressed the City's separation of powers challenge to RFRA. The City had argued that RFRA violates the separation of powers by permitting Congress to legislate an interpretation of the Constitution at odds with the Supreme Court's interpretation. The City cited this Court's statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that it is the duty of the judiciary "to say what the law is." Acknowledging that RFRA is a "direct response to the Supreme Court's decision in *Smith*," the court rejected the notion that RFRA "second-guess[es] the courts." *Flores*, 73 F.3d at 1361. Rather, the court characterized RFRA as a statute regulating "nascent violations" of the Free Exercise Clause, in the sense that it dispenses with the requirement that discriminatory purpose be shown in order to ferret out substantial burdens on the free exercise of religion. *Id.*

The court of appeals also reasoned that because governments *may* accommodate religion more than the Free Exercise Clause requires, Congress has the power to force all governments to accommodate all religious conduct

substantially burdened by a generally applicable law. It concluded: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive." *Id.* at 1363.

The court of appeals also termed as "facile" the United States' argument that RFRA is merely a statute that "provides legislative protection for a constitutional right over and above that provided by the Constitution." *Flores*, 73 F.3d at 1361. The court stated: "We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*." *Id.* Nevertheless, the court upheld RFRA on the theory that Section 5 permits Congress "an extraordinary exercise of power." *Flores*, 73 F.3d at 1362.

Third, the court rejected the City's argument that RFRA violates the Establishment Clause by privileging religion on the ground that RFRA does not "amount to the Government coercing religious activity through 'its own activities and influence.' " *Flores*, 73 F.3d at 1364 (quoting *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987)).

Finally, the court held that RFRA "on its face" does not violate the Tenth Amendment, but left "RFRA's applicability to particular areas of state regulation . . . for individual, case-by-case resolution." *Id.*

The City of Boerne filed a timely Petition for Writ of Certiorari in this Court, and on October 15, 1996, the writ was granted.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act requires governments to accommodate religious conduct unless they

can prove a "compelling interest" and that they have acted with the "least restrictive means." 42 U.S.C. § 2000bb-1, *reprinted in* Cert. Pet. App. at 40a. It was enacted for the purpose of supplanting this Court's interpretation of the Free Exercise Clause announced in *Employment Division v. Smith*, 494 U.S. 872 (1990), with an interpretation more palatable to Congress.

The word "Restoration" in the Act's title is a euphemism. In *Smith*, this Court announced that neutral, generally applicable laws are not subject to the compelling interest standard. *Smith*, 494 U.S. at 885. RFRA's across-the-board, extraordinarily high standard requires more than this Court's free exercise doctrine ever required, either in *Smith* or before *Smith*. This brazen attempt to take over free exercise law knows no parallel in congressional history and violates the separation of powers, federalism principles, and the Establishment Clause.

The courts' core judicial function is to resolve Article III cases or controversies by reading and interpreting the relevant constitutional text. Under the guise of creating a "statutory" cause of action to support a legislatively-preferred reading of the Free Exercise Clause, Congress has taken over the judicial function of interpreting the Constitution in the course of adjudicating cases and controversies.

RFRA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Under *The Civil Rights Cases*, 109 U.S. 3 (1883), Section 5 extends power to Congress solely to enforce constitutional guarantees. *Id.* at 11. The Act's invalidation of every law that incidentally burdens the free exercise of religion, whether the law targets a particular religion or not, creates extra-constitutional rights and therefore exceeds Congress's remedial power under Section 5.

This Court should lay to rest the "substantive power theory," i.e., the notion that Congress may expand the scope of constitutional guarantees, which was an alternative holding in the Voting Rights Act cases, and which transgresses separation of powers and federalism concerns.

The Act oversteps federalism boundaries inherent in Section 5 by forcing state and local governments to abide by a statutory scheme that is not required by the Constitution.

RFRA violates the Establishment Clause by privileging religion over all other forms of conscience. It fails this Court's test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). It does not have a secular purpose. It is certainly not neutral in effect. It requires entanglement of church and state by requiring all governments to become intimately informed on the theological tenets of every religion in the relevant community in order to be able to enact a law that is the least restrictive means.

ARGUMENT

The Religious Freedom Restoration Act mocks the genius of the American Constitution's structure. "From the standpoint of the . . . constitutional structure of this Nation, [the Religious Freedom Restoration Act] bring[s] us to a crossroad that is marked with a formidable 'Stop' sign. That sign compels us to pause before we [are carried] to the point of sanctioning Congress' " attempt to expand the scope of constitutional rights "by simple legislation." *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part).

The success of the Constitution resides in the Framers' fundamental insight that a division of duties,

authority, and power is essential to avoiding the concentrations of power that irresistibly lead to tyranny. In James Madison's words, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Acutely conscious of the history of tyranny in other countries and times, the Framers crafted a series of mechanisms intended to prevent the consolidation of too much power in any one institution. They separated the powers of the federal government into three branches, divided power between the federal and the state governments, and prohibited the union of church and state. With RFRA, Congress has disabled all three mechanisms, simultaneously transgressing three different constitutional boundaries.

I. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE SEPARATION OF POWERS

The Religious Freedom Restoration Act is an undisguised attempt by Congress to overtake this Court's core constitutional function and to reverse this Court's statement of the meaning of the First Amendment's Free Exercise Clause in *Smith*, 494 U.S. 872 (1990). *See, e.g., The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 8, 9, 38, 41, 48 (1990). It rejects the Court's announced standard, which does not apply the Free Exercise Clause to general and otherwise valid neutral laws that incidentally burden religious conduct, and replaces it with one more pleasing to Congress. *See* 42 U.S.C. § 2000bb(a)(4), Cert. Pet. App. at 39a (criticizing *Smith* standard); *id.* at

§§ 2000bb(b)(1), 2000bb-1(a)-(c), Cert. Pet. App. at 40a (instituting compelling interest and least restrictive means tests whenever religious conduct is substantially burdened). "RFRA's rewrite of the Free Exercise Clause . . . is but the vehicle by which Congress seeks to ride into the judicial reservation." Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 111 (1996).

A. Separation of Powers Principles

Long settled constitutional doctrine holds that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); U.S. Const. art. III, §§ 1, 2. The Supreme Court, and only the Supreme Court, is the "ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962). The Supreme Court's core constitutional function is to decide the meaning of the Constitution in the context of deciding Article III cases and controversies.

Where Congress or the President tries to overtake this core judicial function, it violates the separation of powers. "[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)). The judicial branch has been characterized as the "least dangerous branch." *See* Alexander M. Bickel, *The Least Dangerous Branch* (1962). Where its distinctive power to set constitutional standards of review has been usurped, it is the most *irrelevant* branch. In the words of Alexander Hamilton:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution

> is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also United States v. Nixon*, 418 U.S. 683, 703 (1974); *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1463 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard.*"). The eminent constitutional scholar Thomas Cooley articulated the separation of powers problem embedded in RFRA in precise terms: the legislature "cannot compel the courts . . . to adopt a particular construction of a law [and] cannot . . . requir[e] of them a construction of the law according to its own views." Thomas Cooley, *Constitutional Limitations* 94-95 (1868), cited with approval in *Plaut*, 115 S. Ct. at 1455-56.

"Congress simply lacks the constitutional authority to override the Court's interpretation of the First Amendment." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994). After this Court declared the meaning of the Free Exercise Clause in *Smith*, Congress had no latitude to introduce a competing standard and then to direct the courts to implement that standard in cases adjudicating free exercise interests.

With RFRA, Congress has overstepped the bounds of its legitimate constitutional powers and made real the

"fear of legislative usurpation" that animated the Framers' pivotal decision to institute a government of limited powers. Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 32 (1983). In the end, this case is not about religious liberty, but rather about the power of Congress to alter the Constitution's liberty-preserving structure.

Fortunately, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992).

B. The Supreme Court's Free Exercise Doctrine

In 1990, this Court took the occasion of its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to survey First Amendment Free Exercise doctrine. Reaffirming the approach that this Court has employed since its first free exercise decision, *Reynolds v. United States*, 98 U.S. 145 (1879), this Court explained that the compelling interest standard announced eighty-five years after *Reynolds* in *Sherbert v. Verner*, 374 U.S. 398 (1963), had been applied rarely in free exercise cases involving neutral, nondiscriminatory, generally applicable laws. *Smith*, 494 U.S. at 883-85. Justice Scalia, writing for the Court and joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, surveyed the doctrine as follows:

> We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to

> apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test. . . . In *Bowen v. Roy*, 476 U.S. 693 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. . . . In *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes . . . In *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L.Ed.2d 478 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), we sustained without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Smith, 494 U.S. at 883-84 (citations omitted).

Even those in dissent in *Smith* agreed that the compelling interest test had not obtained in every context. Justices Brennan, Marshall and Blackmun joined the section of Justice O'Connor's concurrence in the judgment in which she identified "contexts in which [the Court has] not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest." *Id.* at 900-01 (identifying cases involving the government's conduct of its own internal affairs, military

regulations and prison regulations as subject to deferential review).[2]

The Court continued: "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. . . . We conclude today that the sounder approach, and *the approach in accord with the vast majority of our precedents*, is to hold the [*Sherbert*] test inapplicable to . . . [free exercise] challenges [to generally applicable laws]." *Id.* at 885-86 (emphasis added). In other words, the compelling interest test was inconsistent with most of the Court's free exercise precedents.

The *Smith* Court limited its discussion to the compelling interest test announced in *Sherbert*, not even referring to the least restrictive means test that appears in § 2000bb-1(b) of RFRA. In fact, the least restrictive means test has not been a staple of free exercise doctrine. It has never been used by this Court to invalidate a law and has been cited as a component of the standard of review for free exercise cases in only one case, *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

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[2] Justice O'Connor elaborated on the context-dependent nature of First Amendment jurisprudence in *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481, 2498-99 (1994), stating:

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that might arise under a particular [First Amendment] clause . . . . But the same constitutional principle may operate very differently in different contexts.

In a similar vein, Justice Breyer, joined by Justices O'Connor, Souter, and Stevens, has criticized the "straightjacket" of rigid formulae in the First Amendment arena. *See Denver Area Educ. Telecomm. Consortium, Inv. v. FCC*, 116 S. Ct. 2374, 2385 (1996).

See also The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 380-81 (1992) (statement of Professor Ira C. Lupu) ("You will search the Supreme Court's opinions in *Yoder* and *Sherbert* in vain for the [least restrictive means test].").

The *Smith* Court explained its decision to follow the larger trend of its precedents rather than to extend the compelling interest test beyond the few cases employing it, saying:

> Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S., at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Smith, 494 U.S. at 888.

Five months before RFRA was enacted, the Court reaffirmed its commitment to its free exercise doctrine announced in *Smith* with its decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). The opinion for the Court, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Stevens, White, Scalia, and Thomas, declared: "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition

that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. Although challenged to retreat from the *Smith* Court's analysis by separate opinions authored by Justices Blackmun, *id.* at 577 (Blackmun, J., concurring in the judgment), and Souter, *id.* at 559 (Souter, J., concurring in part and concurring in the judgment), this Court adhered to the *Smith* analysis of free exercise doctrine. Congress ignored this manifest reaffirmation of the Court's free exercise doctrine and enacted RFRA only months later.

C. Congress's Hostile Response to *Employment Division v. Smith*

The plain language of RFRA, as well as its legislative history, make painfully clear that members of Congress read the Court's thoughtful opinion in *Smith* with attention and therefore understood that the Court had declared that the First Amendment's free exercise doctrine does not require strict scrutiny of neutral, nondiscriminatory, generally applicable regulations.[3] *Smith*, 494 U.S. at 888. Not satisfied with the Court's statement of the Free Exercise Clause, Congress, at the insistence of organized religions and civil liberties groups from around the country, drafted and enacted RFRA for the sole purpose of overturning *Smith*.[4]

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[3] The *Smith* decision was the singular focus of the hearings held in support of RFRA. RFRA's legislative history contains no less than 405 pages explicitly referencing *Smith*.

[4] *The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of*

Any hopes that the Executive Branch's veto power might have been exercised to halt this march into the judiciary's terrain were dashed when President Clinton signed RFRA into law, saying RFRA "reverses the Supreme Court's decision [in] Employment Division against Smith." Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub. Papers 2000 (Nov. 16, 1993).

The Religious Freedom Restoration Act is nothing less than a competing interpretation of the Free Exercise Clause. In the Free Exercise context, it turns day to night. It transforms presumptively valid neutral, nondiscriminatory, and generally applicable laws into "presumptively invalid" laws. *Smith*, 494 U.S. at 888.

RFRA bears the hallmarks of a constitutional decision overruling a prior judicial precedent. The text of the Act is not in the least shy about declaring its constitutional character. The Act begins with the following declaration: "[T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." 42 U.S.C. § 2000bb(a)(1), Cert. Pet. App. at 39a. The Act goes so far as to define "exercise of religion" for purposes of the Act as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4), Cert. Pet. App. at 41a.

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the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2, 8, 9, 11, 22, 28-29, 31-32, 35, 38, 41, 48, 49, 51, 61 (1990); *The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 7, 8, 19, 23, 32, 39, 45, 63, 99, 136, 160, 175, 193, 201, 214, 249, 251, 271 (1992).

The Act's scope is constitutional in nature, its sweep breathtaking. RFRA applies to every government and every law in the United States, past, present and future:

Every government. The Act defines "government" as including "a branch, department, agency, instrumentality, and official (or person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2(1), Cert. Pet. App. at 41a.

Every law. The Act states that RFRA "applies to all Federal and State laws, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a), Cert. Pet. App. at 41a. The range of *amici* in support of Petitioner evidences the way in which RFRA invades every arena of government regulation: from the protection of children to historical preservation and urban planning to prison oversight. These in turn reflect only a small portion of the universe affected by RFRA.

Every time. The Act expressly applies to every law that was "adopted before or after November 16, 1993 [the date of RFRA's enactment]." 42 U.S.C. § 2000bb-3(b), Cert. Pet. App. at 41a.

In direct and unmistakable contravention of *Smith*, Congress enacted into law the compelling interest test announced in *Sherbert*, stating, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the law] is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(a), *reprinted in* Cert. Pet. App. at 40a.

Congress also codified in RFRA a least restrictive means test, despite its insignificant role in free exercise cases. *See* 42 U.S.C. § 2000bb-1(b), *reprinted in* Cert. Pet. App. at 40a. In short, RFRA mandates a standard – the

compelling interest test – that the Supreme Court expressly stated was not the traditional or the appropriate standard in free exercise cases, *Smith*, 494 U.S. at 884-85, and appends to it a test so infrequently invoked that the *Smith* Court found it unnecessary to address.

RFRA's new standard marks a sea change from prior free exercise law. The least restrictive means test by itself transforms *Smith*'s presumption of validity for neutral, generally applicable laws into a standard that "will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 294-95 (1985) (Rehnquist, J., dissenting).

Predictably and ironically, in Congress's headlong rush to "fix" free exercise law, Congress drafted a new free exercise standard. As the preceding description of the Court's doctrine should make clear, the euphemistically-named Religious Freedom Restoration Act does not restore the free exercise doctrine in place before *Smith* but rather creates out of whole cloth a new free exercise standard characterized by a rigid, across-the-board standard not in evidence in the "vast majority" of the Court's Free Exercise decisions before *Smith* was decided. *Smith*, 494 U.S at 882-87; *see also id.* at 900-01 (O'Connor, J., concurring). Indeed, the most oppressive aspect of RFRA for governments – the least restrictive means test – is a virtual novelty in the free exercise arena. *See supra* part I.B. If what members of Congress intended to do was to restore prior law, they bungled the job rather seriously.

Congress has co-opted the Court's interpretive role. As a direct result, the courts have been relegated in free

exercise cases to the role of interpreting Congress's inaccurate assessment of the Constitution, rather than their constitutionally appointed role of interpreting the Constitution itself.

RFRA's defenders have attempted to gloss over its glaring separation of powers faults by stating that it is merely a "statutory" right over and above a constitutional floor set by the Court. The characterization of RFRA as a "mere statutory right," however, is nothing more than a thin pretext for Congress's attempt to overtake the Court's appointed role in interpreting the Free Exercise Clause of the First Amendment. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) ("[T]he judicial department . . . will decide whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government."). The lower courts have had little patience with this misleading defense of RFRA. See *Flores*, 73 F.3d at 1361; *Hamilton v. Schriro*, 74 F.3d 1545, 1563 (8th Cir. 1996) (McMillian, J., dissenting); *Hodge v. Magic Valley Evangelical Free Church, Inc.*, 200 B.R. 884, 900-01 (Bankr. D. Idaho 1996); *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591, 599 (D. Md. 1996).

D. RFRA Must Be Struck to Preserve the Balance of Power Between the Court and Congress

The Supreme Court bears responsibility to delineate the constitutional scope of congressional power to legislate. *See United States v. Lopez*, 115 S. Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring); *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). As then-Justice Rehnquist has stated,

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome, 446 U.S. at 207 (Rehnquist, J., dissenting). RFRA's transgression of judicial power overcomes this presumption of constitutionality. "To allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure." *Mitchell*, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part).

> In essence, Congress has instructed the Supreme Court how to interpret the Free Exercise Clause of the First Amendment (that is, apply the compelling interest test), even though the Court, the entity charged by the Constitution with its application, has determined that the compelling interest test is neither feasible nor required. It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to the delicate balance of the separation of power.

Hamilton, 74 F.3d at 1566 (McMillian, J., dissenting).

There is nothing ambiguous about RFRA's separation of powers violation. This Court's statement of the free exercise standard in *Smith* was stated in plain terms. And Congress's act of overriding that standard is unmistakable in the title, the plain language of the Act, and in its

legislative history.[5] Never before has the Court's constitutional preserve of power been compromised to this extent. RFRA is nothing short of a hostile takeover of this Court's constitutionally appointed role in free exercise cases.

Without a doubt, religious liberty is at the heart of this country's experiment with democracy. This Court stated in *Smith* that governments could and would accommodate religion with specific exemptions from generally applicable laws. *See Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."). But the power of accommodation does not make any and every congressional foray into the free exercise preserve safe from constitutional error. However Congress may act to protect religious liberty, it must not be permitted to enter this deeply important arena by undermining the courts' authority to interpret the Constitution.

To restore the balance of power between Congress and the Court intended by the Framers to ensure liberty,

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[5] As Congressman Henry J. Hyde pointed out during its enactment, RFRA's very title betrays its constitutional violation: "Congress writes laws – it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment." H.R. Rep. No. 88, 103d Cong., 1st Sess. 15 n.3 (1993).

the Religious Freedom Restoration Act must be struck down.[6]

II. THE RELIGIOUS FREEDOM RESTORATION ACT IS NOT A LEGITIMATE EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. "This article," is the Fourteenth Amendment, which provides a set of constitutional guarantees against the states. By the plain language of Section 5, Congress may enforce only constitutional guarantees contemplated by the Fourteenth Amendment.[7] There is not

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[6] To state the matter from a different perspective, although one just as grounded in the fundamental structure of the Constitution, if RFRA is constitutional, then Congress can amend the Constitution without the cumbersome, but extraordinarily important ratification procedures dictated by Article 5 of the United States Constitution. Not only has Congress stepped into the Court's preserve, it has also overtaken the people's authority, exercised through state conventions, to ratify constitutional amendments. *See also Mitchell*, 400 U.S. at 152 (Harlan, J., concurring in part and dissenting in part).

[7] The plain language of Section 5 also makes clear that it only provides Congress power to regulate state law. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 605-06 (1990) (O'Connor, J., dissenting):

> Section 5 empowers Congress to act respecting *the States*, and of course this case concerns only the administration of federal programs by federal officials. Section 5 provides to Congress the "power to

the least intimation that Congress has the power to enforce its policy predilections beyond constitutional guarantees. *See City of Rome*, 446 U.S. at 206 (Rehnquist, J., dissenting); *Mitchell*, 400 U.S. at 152 (Harlan, J., concurring in part and dissenting in part). Congress's attempt with RFRA to force state and local governments to accommodate religious conduct more than this Court has said the Constitution requires runs headlong over a dangerous precipice.[8] A decision to uphold RFRA would

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enforce, by appropriate legislation, the provisions of this article," which in part provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In fact, RFRA's legislative history is silent on the enumerated power that justified its regulation of the free exercise standard of review against federal law, making it difficult for the Court to assess that question in a case that raises the issue. *See Lopez*, 115 S. Ct. at 1631-32.

[8] If section 5 permits Congress to enact RFRA and to force state and local governments to dance to Congress's policy tune, then the Congress may now turn to enacting the "Ultimate Free Speech Act," which would require all governments to justify laws affecting speech by demonstrating a compelling interest and proving their duly enacted laws were the least restrictive means. Such a law would overturn, at a minimum, this Court's decisions regarding sexually explicit speech that have been sensitive to local control over such materials and would force local governments to accommodate pornography much more than the Court has declared the Constitution requires. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *New York v. Ferber*, 458 U.S. 747 (1982); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The Court's legitimate role in carefully drawing the all-important lines between First Amendment interests and the community's power to govern itself disappears if Congress can do what it has done in RFRA.

overrule *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), which were decided in the same era as the passage of the Fourteenth Amendment, and in which the Court stated that Section 5 "invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition [found in the Fourteenth Amendment] . . . "

The Religious Freedom Restoration Act "does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed." *The Civil Rights Cases*, 109 U.S. at 11. Indeed, the Act makes no pretense to enforce only the constitutional guarantees against specifically targeted legislation recognized as unconstitutional in *Smith* and redressed in *Lukumi*. *Smith*, 494 U.S. at 872; *Lukumi*, 508 U.S. at 520. Rather, the Act was intended to prohibit all substantial burdens on "a person's exercise of religion even if the burden results from a rule of general applicability . . . . " 42 U.S.C. § 2000bb-1(a), Cert. Pet. App. at 40a. *See also* 42 U.S.C. § 2000bb(a)(4), Cert. Pet. App. at 39a (stating that *Smith* "eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . . "); H.R. Rep. No. 88, 103d Cong., 1st Sess. 1239 (1993) ("[T]he test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion."). The purpose of the Act is to supplant *Smith*, not to reinforce it. Thus, RFRA directs courts to enforce wholly extra-constitutional "rights," moving it well beyond the preserve of Section 5 power.

A. RFRA Is Unlike Any Other Statute

The various Section 5 arguments of RFRA's defenders boil down to one claim: the Court has upheld similar statutes before. That is, emphatically, untrue for two reasons.

First, and without a doubt, the Religious Freedom Restoration Act is in a class by itself. This is the first time Congress has attempted to preempt this Court's declared standard of review. Never before has Congress attempted to take the reins from the Court over a clause of the First Amendment, or, for that matter, over any clause of the Constitution.

The only congressional action that bears a surface resemblance to RFRA's blatant attempt to trump this Court's constitutional determination is the Human Life Bill, which was intended to overrule *Roe v. Wade*, 410 U.S. 113 (1973). *See* The Human Life Bill, S. 158, 97th Cong., 1st Sess. (1981). That bill faltered in part because of concerns raised about the constitutionality of Congress overruling a decision by the Supreme Court. Senator Orrin Hatch, one of its primary sponsors, refused to vote in favor of the Bill on the grounds that it overturned this Court's decision in *Roe v. Wade*, and therefore exceeded congressional authority under Section 5 of the Fourteenth Amendment. *Staff of Subcomm. on Separation of Powers of Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., Report on Human Life Bill, S. 158, together with additional and minority views 35 (Comm. Print 1981). RFRA, with its broad sweep, strays into the judiciary's terrain even more than the Human Life Bill, which affected only one issue – abortion – within the Court's privacy doctrine. RFRA stands by itself.

Second, the cases on which RFRA's defenders rely simply do not hold that Congress may reverse a Supreme Court decision by altering the standard of review in any, let alone all, cases.

B. RFRA Is Inconsistent With the Enumerated Power Requirement Announced in *M'Culloch v. Maryland*

The test for determining whether a statute is consistent with the enumerated power requirement was announced by this Court in *M'Culloch*, 17 U.S. (4 Wheat.) at 421:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

See also Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1879). The Religious Freedom Restoration Act fails all three prongs of the *M'Culloch* test applied by the Fifth Circuit.

1. The Religious Freedom Restoration Act Is Not Within the Scope of the Constitution

The Fifth Circuit erred in its holding that RFRA enforces guarantees to be found in the Fourteenth Amendment. The court of appeals' error lies in its failure to grasp this Court's free exercise doctrine. The court of appeals employs RFRA as its benchmark for constitutional protection, assuming that all substantial burdens

on the exercise of religion automatically trigger constitutional protection. *Flores*, 73 F.3d at 1355. That view, however, is plainly rejected by this Court in *Smith* and *Lukumi*. *See Smith*, 494 U.S. at 881; *Lukumi*, 508 U.S. at 531. Neutral, generally applicable laws that incidentally burden religious exercise do not trigger close judicial review in free exercise cases. As Justice Scalia stated in his concurrence in *Lukumi*:

> The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment.

508 U.S. at 557 (Scalia, J., concurring in part and concurring in the judgment).

The guarantee against all substantial burdens on religious exercise is located in a congressional enactment, RFRA, not a constitutional source. As such, RFRA is not "within the scope of the constitution." *M'Culloch*, 17 U.S. (4 Wheat) at 421.

2. The Religious Freedom Restoration Act Is Not Plainly Adapted to Achieve Constitutional Ends

Nor is RFRA "plainly adapted to" constitutional ends. As the preceding discussion makes clear, RFRA is

designed to *fill in* a perceived gap in free exercise protection left open by *Smith*, not to enforce rights guaranteed by the Constitution. The Fifth Circuit found this prong satisfied on the basis of this Court's decisions in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980), holding that Congress properly exercised its remedial power under Section 5 when it enacted RFRA. *Flores*, 73 F.3d at 1356-57. The remedial power found in these cases, however, does not justify RFRA.

Defenders of RFRA have also posited that RFRA is "plainly adapted to" constitutional ends because Section 5 gives Congress the power to expand the substantive scope of constitutional guarantees. This is the substantive power theory. The following discussion of Congress's Section 5 power will first address the remedial power theory and then the substantive power theory.

a. *The Remedial Power Theory*. Congress offered no basis for the exercise of its power in RFRA other than Section 5, specifically citing the Voting Rights Act cases.[9] Section 5 gives Congress the power to "enforce" or remedy, constitutional guarantees secured by the Fourteenth Amendment. Congress missed the mark. The Voting Rights Act cases simply do not stand for the proposition that Congress may "remedy" potential constitutional violations by altering the standard of review in all cases raising a particular constitutional issue.

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[9] *See The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm.*, 101st Cong., 2d Sess. 73-75 (1990) (letter of Professor Laycock).

i. *The Voting Rights Act Cases Do Not Support RFRA.* The Voting Rights Act cases read Section 5's remedial power to permit Congress, when employing the Supreme Court's previously announced standard, and on the basis of its superior factfinding capacity, to reach a conclusion under that standard at odds with Supreme Court determinations *under the same standard*. Under the Court's broadest reading of the remedial power, Congress has been permitted to enact prophylactic legislation that bans actions not forbidden by the Constitution for the purpose of enforcing constitutional guarantees. RFRA treats that prophylactic power as a warrant to enforce ends not guaranteed by the Constitution and therefore exceeds Section 5. *The Civil Rights Cases*, 109 U.S. at 19.

This Court's decision in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved Section 4(e) of the Voting Rights Act of 1965, which provides that persons who have received a primary education in Puerto Rico cannot be denied the right to vote. *Id.* The federal law was in direct conflict with New York's law requiring English literacy as a condition to vote, a law that was presumably not unconstitutional "on its face" under *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 54 (1959). Section 4(e) was challenged by New York State as beyond Congress's Section 5 power and in derogation of the Tenth Amendment. This Court upheld Section 4(e) as an exercise of Congress's power to remedy Equal Protection violations, stating that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to *secure the guarantees of the Fourteenth Amendment*." *Morgan*, 384 U.S. at 651 (emphasis added). *See also id.* at 652 (quoting Section 4(e) purpose "to secure the rights under the fourteenth amendment"). This Court left to Congress

the power "to assess and weigh the various conflicting considerations," in determining whether constitutional guarantees were being infringed. *Id.* at 653.

The Court in *Morgan* did not hand Congress carte blanche to overrule Supreme Court declarations of the appropriate standard of review in constitutional cases. Rather it stated that its decision in *Lassiter* was "inapposite," *Morgan*, 384 U.S. at 649, when Congress is engaging its factfinding capacities to protect Equal Protection guarantees. RFRA, of course, protects extra-constitutional interests and therefore exceeds congressional authority. *The Civil Rights Cases*, 109 U.S. at 11.

In *City of Rome*, in addressing the reach of Congress's power under Section 2 of the Fifteenth Amendment, the Court held, as in *Morgan*, that Congress could reach a factual conclusion at odds with a prior Supreme Court case. This Court upheld the Voting Rights Act's ban on electoral changes discriminating in effect, even though Section 1 of the Amendment only prohibited intentional discrimination. *City of Rome*, 446 U.S. at 177. Congress rationally concluded that there existed significant risk of purposeful discrimination that justified the enactment of a marginally overbroad remedy. *Id.* at 173-78. Once again, in the context of a detailed statute addressing the specifics of voting practices, the Court expressed its willingness to permit Congress to cure a particular constitutional evil with means deduced from a factual record indicating a link between the congressional remedy and a constitutional guarantee. *Id.* at 179. RFRA bears no corresponding correlation. It is hardly a detailed plan to cure a particular constitutional evil; it is based on the thinnest of factfinding records, especially when compared to its broad sweep; and it is aimed plainly at extra-constitutional evils.

Neither *Morgan* nor *City of Rome* provides precedent that supports the extraordinary exercise of power found in RFRA.[10] Even in the Court's most expansive Section 5 cases, the remedial power has been limited to the exercise of superior factfinding skills in the context of applying the Court's designated standard for constitutional violations. This Section 5 doctrine in no way creates a haven for RFRA's bald rejection of the Court's interpretation of the Free Exercise Clause of the First Amendment in all cases.

ii. *Congress Made No Factfindings in Passing RFRA That Would Support Its Extreme Overenforcement of Religious Interests.* Apparently, even Congress did not believe RFRA could be justified as an exercise of Congress's remedial power. Despite being urged by Professor Laycock to do so, *see Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 357-58, 398 (1992), Congress engaged in no meaningful factfinding that would support the need for a congressional remedy in the free exercise arena. Indeed, Congress's express "Findings" in the Act speak to its dissatisfaction with *Smith*, not the state of religious liberty in the United States. 42 U.S.C. § 2000bb, Cert. Pet. App. at 39a.

Congress simply did not ask what effect RFRA would have on the thousands, if not millions, of regulations that would be affected by RFRA, for example, regulations

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[10] Nor do *Runyon v. McCrary*, 427 U.S. 160 (1976), *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), or *James Everard's Breweries v. Day*, 265 U.S. 545 (1924), which were decided under the Thirteenth and Eighteenth Amendments, respectively, not the Fourteenth Amendment.

governing emergency medical care of children in imminent danger of dying or sustaining permanent disability, childhood immunization requirements, child support payments, state-mandated autopsies, school safety laws governing the carrying of dangerous weapons, bankruptcy proceedings involving churches, the removal of Native American remains from church grounds, and every aspect of land use law. *See, e.g., Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (holding that Sikh schoolchildren must be permitted to carry knives in violation of school rule against the carrying of dangerous weapons).

"The enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress." *Keeler v. Mayor & City of Council of Cumberland*, 928 F. Supp. 591, 603 (D. Md. 1996). In fact, "Congress abdicated its responsibility to investigate the particular state action which might have the potential of unconstitutionally burdening the free exercise of religion . . . . " *Hamilton*, 74 F.3d at 1567 (McMillian, J., dissenting).

Under the prophylactic theory of *Morgan*'s first rationale, this Court has not upheld congressional action that overenforces constitutional guarantees against the states in the absence of a history of the states' unwillingness to comply with the constitutional standard. What "Congress has done through RFRA's passage under the banner of § 5 is dramatically different from its exercise of § 5 power in *Morgan* or in any other case to date." *Hamilton*, 74 F.3d at 1568 (McMillian, J., dissenting). Unlike the Voting Rights Act, the Religious Freedom Restoration Act was not necessitated by a refusal by state and local governments to abide by the Constitution, thereby requiring prophylactic legislation. *See Sasnett v. Sullivan*, 91 F.3d 1018,

1021 (7th Cir. 1996) ("We are given some pause . . . by the lack of a recent history of governmental discrimination against religious observance. . . . [I]t is not easy to take entirely seriously the proposition that the enactment of RFRA was necessary in order to prevent the states from engaging in forms of intentional discrimination that, unlike the ordinance invalidated in *Church of the Lukumi Babalu Aye*, could not readily be shown to be intentional."). The thin record supporting RFRA is in sharp contrast to this Court's description of the record on which the Voting Rights Act was based:

> Two points emerge vividly from the voluminous legislative history of the [Voting Rights] Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966). *See also Shaw v. Reno*, 509 U.S. 630, 640 (1993); *City of Rome*, 446 U.S. at 182; *Gaston County, N.C. v. United States*, 395 U.S. 285, 291 (1969). The RFRA legislative history is replete with denigrations of *Smith* but only sporadically dotted with a limited number of anecdotal reports of religious suppression. This Act invites this Court to charge Congress with the responsibility of building a record in overenforcement cases which would clarify, "streamline – and sharpen – the judicial task of reviewing federal legislation" under Section 5. Harold J. Krent,

Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings, 46 Case W. Res. L. Rev. 731, 737 n.20 (1996).

In conclusion, RFRA is not a constitutionally legitimate prophylactic measure; rather, it is an unjustified and abusive exercise of Congress's remedial power under Section 5. *See Hamilton*, 74 F.3d at 1570 (McMillian, J., dissenting) ("This is not prophylaxis but unconstitutional interbranch hegemony.").

b. *The Substantive Power Theory.* To be completely fair to those who passed RFRA in reliance on *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and to those who continue to defend RFRA under *Morgan*, language in that decision implies a congressional power to expand the scope of constitutional guarantees:

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Morgan, 384 U.S. at 651 n.10. This overreading of *Morgan* has been pervasive in the legal academy, and has misled the lower courts into upholding RFRA. *See, e.g., Belgard v. State of Hawai'i*, 883 F. Supp. 510, 513 (D. Haw. 1995).

Yet, the substantive power theory has never been the dispositive basis for a decision by this Court. Even in *Morgan*, it was only an alternative ground for decision. *Morgan*, 384 U.S. at 652-53 (justifying statute as exercise of remedial power under Section 5). *See also* Daniel O.

Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 51-52 (1995). As then-Justice Rehnquist has pointed out, five members of this Court rejected the substantive power theory in the later-decided case of *Oregon v. Mitchell*, 400 U.S. 112 (1970), *see City of Rome*, 446 U.S. at 220-21 (Rehnquist, J., dissenting), while only four members were in favor of the theory. *Mitchell*, 400 U.S. at 239-81 (Brennan, J., dissenting); *id.* at 135-44 (Douglas, J., dissenting). *See also EEOC v. Wyoming*, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) ("I have always read *Oregon v. Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter' . . . ").

This Court has in fact rejected the substantive power theory in the context of the Fifteenth Amendment, the enforcement language of which is almost identical to Section 5. Congress has been found to have exceeded its Fifteenth Amendment enforcement powers when "Congress has attacked evils not comprehended by the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (citing *United States v. Reese*, 92 U.S. (2 Otto) 214, 217-18 (1875); *James v. Bowman*, 190 U.S. 127, 138 (1903)).

The substantive power theory hands Congress a power at odds with the separation of powers, and it permits Congress to yoke the states to its policy predilections in violation of the federalism constraints inherent in Section 5. The great Justice Harlan dissented in *Morgan*, because he believed that Congress must not be permitted to re-define the scope of constitutional guarantees. Legislation like the Religious Freedom Restoration Act can only be "sustained . . . at the sacrifice of fundamentals in

the American constitutional system – the separation between the legislative and judicial function and the boundaries between federal and state political authority." *Morgan*, 384 U.S. at 659 (Harlan, J., dissenting). He reaffirmed his commitment to these principles when he joined four other members of this Court to hold in *Mitchell* that Congress lacked the power to determine that the voting age in state elections ought to be 18 rather than 21. *See Mitchell*, 400 U.S. at 204-07 (Harlan, J., concurring in part and dissenting in part); *id.* at 296 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); *id.* at 124-30 (Black, J.).

These essential truths were echoed by then-Justice Rehnquist in dissent in *City of Rome* when he stated that Congress's attempt to override the Supreme Court's interpretation of the Constitution under the Fourteenth Amendment "requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned." *City of Rome*, 446 U.S. at 221 (Rehnquist, J., dissenting). *See also id.* at 207, 210-13, 220-221.

Although the Court did not reach the Section 5 issue in *EEOC v. Wyoming*, 460 U.S. 226 (1983), four members of this Court – Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor – went to great lengths to reject the notion that Congress may "define rights wholly independently of [this Court's] case law . . . . " *Wyoming*, 460 U.S. at 262 (Burger, C.J., dissenting). To the contrary, "[a]llowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." *Id.*

The Religious Freedom Restoration Act makes real what Justice Harlan only imagined when he dissented in *Morgan*:

> To deny the effectiveness of [the Voting Rights Act] is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that [the Act] overrides the New York [law] seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere ipse dixit can set the otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

Morgan, 384 U.S. at 671. With RFRA, Congress has fulfilled Justice Harlan's hoped-against prophecy to the nth degree. It is *ipse dixit* that blankets *every* field of state competence. The passage of RFRA invites this Court to set to rest, once and for all, the troublesome and constitutionally misguided notion that Congress has plenary power to interpret the Constitution at odds with this Court's interpretation and to force that interpretation on the courts.[11]

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[11] Even if this Court were inclined to read the *Morgan* decision as providing a substantive power to Congress, the *Morgan* decision and the other Voting Rights Act cases speak only to Congress's power vis-a-vis the Equal Protection Clause. They say nothing of congressional power to "ratchet" rights

Finally, even if this Court were to read *Morgan* as relying on a substantive power theory, the purported alteration of the constitutional calculus in that case, and in *City of Rome*, is mere tinkering compared with the broad-brush attack on the Court's constitutional doctrine in RFRA. By upholding RFRA on a substantive power theory, the Court would be vastly expanding the power of Congress even beyond that arguably contemplated in *Morgan* and *City of Rome*.

In sum, the Religious Freedom Restoration Act is not plainly adapted to constitutional ends and therefore fails the second prong of the *M'Culloch* test. RFRA was not enacted pursuant to a legitimate exercise of Congress's remedial power, and the substantive power theory deserves to be definitively interred by this Court at this time.

3. The Religious Freedom Restoration Act Is Prohibited by and Inconsistent with the Letter and Spirit of the Federalism Constraints Inherent in Section 5

The *M'Culloch* test finally requires congressional action "which [is] not prohibited, but consist[ent] with

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incorporated into the Fourteenth Amendment from the Bill of Rights. The original purpose of the Fourteenth Amendment was to empower Congress and the courts to eliminate state-sponsored racial discrimination. The Bill of Rights, by contrast, was designed to limit Congress itself, making the argument for expansive congressional authority over such rights suspect. *See Hutto v. Finney*, 437 U.S. 678, 710 (1978) (Rehnquist, J., dissenting); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 361-64 (1994); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1582, 1595 (1995).

the letter and spirit of the constitution . . . . " *M'Culloch*, 17 U.S. at 421. Because the Act violates the separation of powers, *see supra* sec. I, federalism principles inherent in Section 5, *see infra*, and the Establishment Clause, *see infra* sec. III, it fails the final *M'Culloch* prong.

The Religious Freedom Restoration Act is a bold and unprecedented example of federal social policy engineering that commandeers the states to follow the federal government's decision to accommodate religion more than the Constitution requires. RFRA intrudes on the sovereign power of the states. *See New York*, 505 U.S. at 155-57. Congress is a body of enumerated powers, and it must respect state integrity in that exercise. *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1127, 1132 (1996); *Lopez*, 115 S. Ct. at 1626; *New York*, 505 U.S. at 156-57; *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991). As this Court stated in *New York*, " 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.' " *New York*, 505 U.S. at 162 (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)).

Congress may not ignore principles of federalism when it exercises its Section 5 powers. Rather, federalism principles provide innate limitations on the exercise of such power. As this Court declared in *New York*, 505 U.S. at 159, per Justice O'Connor:

> [J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or of discerning the core of sovereignty retained by the States under

> the Tenth Amendment. Either way, we must determine whether [the Act] . . . oversteps the boundary between federal and state authority.

One year earlier, this Court stated in *Gregory* that "the Fourteenth Amendment does not override all principles of federalism." *Gregory*, 501 U.S. at 469. The history of the Fourteenth Amendment makes it abundantly clear that "its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions." Alexander Bickel, *The Voting Rights Act Cases*, 1966 Sup. Ct. Rev. 79, 97.

This case, which involves quintessentially local prerogatives over land use, illustrates vividly the incursion RFRA makes on federalism concerns. Laws governing land use, and in particular historical preservation, are of intense local concern. "Respect for local landmark law is founded on principles of federalism." Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 Duke L.J. 1598, 1624 (1992). Thus, the enforcement of historic preservation law has been a matter left almost entirely to state and local governments, with supporting legislation from the federal government. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See generally*, Jane Papademetriou Kourtis, Comment, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. Envtl. Aff. L. Rev. 793, 798-804 (1989).

History in and of itself is a commodity of compelling importance to a community. It educates, it comforts, and it solidifies a community's shared sense of itself. Francis Bacon said truly that "[h]istories make men wise." The Essays Or, Counsels, Civil and Moral of Francis Bacon, *Of Studies* 14 (1883). This Court has recognized the educative

value of history, stating that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

The Court's "cases are quite clear that there are real limits to federal power." *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). *See also Gregory v. Ashcroft*, 501 U.S. 452 (1991). Those limits are transgressed by RFRA. Tests of compelling interest and least restrictive means dramatically skew the balance of power between local governments and churches on land use issues, including historical preservation, to the detriment of this traditional area of local autonomy. *See* Cert. Pet. at 6-7. In the end, RFRA tips "the scales too far" in favor of the federal government and in derogation of the states. *See Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring); *Gregory*, 501 U.S. at 467-70 (holding that absent a plain statement, congressional legislation under Section 5 will not be interpreted to reach certain state political functions); *id.* at 469; *Pennhurst State School v. Halderman*, 451 U.S. 1, 16 (1981) ("Because [legislation under Section 5] imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."); *Wyoming*, 460 U.S. at 259 (Burger, C.J., dissenting) ("The Tenth Amendment was not, after all, repealed when the Fourteenth Amendment was ratified: it was merely limited.").

Congress has done in RFRA what – in our constitutional scheme – only the states may do themselves. Without question, the states voluntarily could protect religious liberty more robustly than the Federal Constitution through their own constitutions or through legislative action. *See* William J. Brennan, Jr., *State Constitutions and*

the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); Angella C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275; *Wisconsin v. Miller*, 549 N.W.2d 235, 239-41 (Wis. 1996); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 725 (N.J. 1975). But *Congress* may not curtail state and local government lawmaking by forcing the states to observe a higher standard of religious liberty than the Court has deemed the Constitution requires. *New York*, 505, U.S. at 161-65; *Wyoming*, 460 U.S. at 259-63 (Burger, C.J., dissenting).

The Religious Freedom Restoration Act violates the principles of federalism reflected in the Tenth Amendment and operating as an inherent constitutional limitation on the exercise of Section 5 authority against the states.

III. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. The purpose of the Establishment Clause, which is specifically addressed to Congress, is to prevent the union of Congress with organized religions. Such a union is the definition of tyranny. "For fourteen hundred years, tyranny presented a united front, thereby forcing those who would declare their independence to fight a revolution to resist all tyranny, whether of church or of state, for in the final analysis all tyranny was one." Edwin S. Gaustad, *A Religious History of America* 115 (1990). In James Madison's words, "The connection of Church and State was fatal to

the liberty of both." Adrienne Koch, Madison's "Advice to My Country" 27 (1966).

This Court announced its test to be applied in Establishment Clause cases in *Lemon v. Kurtzman*: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674 (1970)). This test is not satisfied by RFRA. *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 285-302 (1994).

There is no secular purpose in RFRA. The plain purpose is to provide statutory protection for all substantial burdens on religion, whether constitutionally protected or not. Unlike the type of narrowly tailored accommodation of religion contemplated by the Court in *Smith*, 494 U.S. 872 (1990), and occasionally permitted under the First Amendment, RFRA establishes an across-the-board scheme that deliberately singles out religious practices, en masse, as a congressionally favored class of activity. Congress has proffered no secular rationale – just as it has offered no factual findings – as to why such across-the-board special treatment is necessary to correct specific constitutional wrongs.

There is certainly no neutral effect. Churches have now become privileged members of every community, federal, state, or local, on every issue. The sheer breadth and substantive strength of RFRA necessarily "advance" religion, both in absolute terms and in relation to functionally comparable nonreligious forms of belief and

practice. The entire purpose of the statute, after all, is to establish a new balance – a new equilibrium – between religion and government, entirely different from the baseline of neutrality contemplated by the Court in *Smith*.

The Act miserably fails the entanglement prong by forcing every government to become expert on every religion. There is now necessary entanglement every time a community seeks to enact a law, for it must investigate whether the law will be the means of accomplishing its goal that is the least restrictive of every religion's requirements. That cannot be done without extensive investigation into the theological requirements of every relevant religion. City Councils are encouraged now to have on file detailed descriptions of every religion present and likely to be present in their communities so that they can know whether each law is narrowly tailored for every religion. Unlike the procedure envisioned by this Court in *Smith* where a city must act neutrally and in a generally applicable way and then may consider specific requests for accommodation that are raised after passage, *Smith*, 494 U.S. at 890, RFRA places cities in the position of considering every potential religious objection to every ordinance, from the perspective of each religious believer. The Religious Freedom Restoration Act both entangles and strangles local lawmaking capacity.

In *Lee v. Weisman*, 505 U.S. 577, 587 (1992), this Court held that government may not endorse the message of a particular religion. RFRA endorses a global message: the government likes religion. This message violates the fundamental constitutional requirement of neutrality on issues of conscience. *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481, 2487 (1994); *Lee v. Weisman*, 505 U.S. 577 610-11 (1992) (Souter, J., concurring); Christopher L. Eisgruber & Lawrence G. Sager, *Why*

the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 444 (1994). Congress may not favor religion over nonreligion or religion over philosophy. As this Court stated in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), laws may not " 'invade the sphere of intellect and spirit which . . . [is] reserve[d] from all official control.' " (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). *See also Lawson v. Singletary*, 85 F.3d 502, 506 n.2 (11th Cir. 1996). In sum, by entangling religion and government and by privileging religion, RFRA violates the Establishment Clause.

CONCLUSION

The Religious Freedom Restoration Act is different from any other act Congress has ever passed. Never before has Congress attempted to define for itself the core meaning of a clause of the Constitution and then to force that interpretation on the courts in every case raising the constitutional issue.

This Act is unconstitutional because it goes too far. With RFRA, Congress has wrested from this Court its core judicial function of finally interpreting the meaning of the Constitution, has trespassed against the states by requiring them to accommodate religious conduct more than the Constitution requires, and has forced all governments to become entangled in the theological tenets of every religion. Whatever the merits of Congress's objection to the *Smith* decision, it cannot "fix" religious liberty in flagrant disregard of settled principles of separation of powers, federalism, and church-state relations. Although the Court owes Congress deference as a coordinate

branch, the obvious constitutional evils of this statute dictate that it be struck down.

This Court should declare the Religious Freedom Restoration Act unconstitutional, reverse the judgment below, and remand the case to the district court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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Dated: November 29, 1996

Supreme Court, U.S.
FILED
JAN 10 1993
OFFICE OF THE CLERK

No. 95-2074

In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, and UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. §2000bb to 2000bb-4 (1994), is a facially valid exercise of Congressional power to enforce the Fourteenth Amendment.

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STATEMENT OF THE CASE

1. The Underlying Dispute. This case involves the right of a religious community to worship together, and the right of excluded individuals to attend the Roman Catholic Mass, in St. Peter Church in Boerne, Texas. The Church's existing building was built in 1923 and is now far too small to seat the parishioners who wish to attend Mass on Sunday morning. Jt. App. 9-10 ¶25; *id.* at 68 ¶o. The pastor's undisputed affidavit states that St. Peter can seat only 230 worshipers at a time, and that 40 to 60 more than that regularly attempt to attend 11:00 Mass on Sunday. R.255-56. Total membership is 2,170 and growing. *Id.* The record does not indicate how many worshipers are turned away at Christmas and Easter, or how many have given up trying to attend on Sunday morning. The City has refused every request for a permit to enlarge the church building to make it adequate to the parish's needs. Jt. App. 68-70 ¶¶v, y, cc. The record does not reflect the fact, but after the adverse ruling in the trial court, the Church began celebrating Mass in an ill-suited secular auditorium.

The church building's front facade is located within the historic district authorized by Ord. 91-05 and created by Ord. 91-15 of the City of Boerne. *Id.* at 6 ¶11; *id.* at 68 ¶s. The Church had relied in two ways on the stated boundaries of the historic district as originally proposed: it did not oppose inclusion of the front facade, and it designed a new church building that would preserve the front facade. *Id.* at 7 ¶12. But the City refused a permit for the new building, stating that it would not approve any plan that required demolition of any part of the church building either inside or outside the boundaries of the district. Well after this lawsuit was filed, the City amended the boundaries of the historic district to include the entire church building. Ord. 94-17.

The church building is *not* an historical landmark, Jt. App. 7 ¶12; *id.* at 68 ¶t, and in fact is merely a modern imitation of a Spanish mission. The City describes this as "mission revival." City Br. 2. But the City says that it uses the word "historical" in a way that might "fool" its citizens, and that even buildings from the 1950s should be preserved. Jt. App. 28. Within the district, the City regulates every detail of a building's appearance. *Id.* at 31-32.

Most important, the building cannot be replaced or expanded,

even though it has become wholly inadequate for its longstanding and constitutionally protected use. The City would apparently permit the Church to build a second place of worship nearby, provided that it perpetually maintains the old church building as a sort of architectural museum. The existing site is hilly, and the Church's architect has estimated the extra cost of construction elsewhere on that site at $500,000. Jt. App. 42. The City's architect disputes that figure, based on the counterfactual assumption that "topography and soil conditions are the same throughout the site." *Id.* at 43-44.

2. The Litigation. The litigation is accurately summarized in the briefs of the City and the United States. We would add two points. First, because the RFRA claim was dismissed as a matter of law, the allegations of the complaint are to be taken as true. Second, there are pending in the District Court state and federal constitutional claims not at issue here, including claims under the Free Exercise Clause and the Takings Clause. Jt. App. 13-21.

3. The Statute. The Religious Freedom Restoration Act passed the House of Representatives unanimously, 139 Cong. Rec. H8713-15 (Nov. 3, 1993), and the Senate by 97-3, *id.* at S14470-71 (Oct. 27, 1993). RFRA creates a statutory right to the free exercise of religion. 42 U.S.C. §2000bb-1(b) (1994). This *statutory* right is in aid of the narrower *constitutional* right to the free exercise of religion. Under *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Constitution permits neutral and generally applicable laws to be applied in ways that suppress religious practices; government need not justify such burdens on religion. *Id.* at 885. But burdens that are not neutral and generally applicable must be justified by a compelling interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-40, 546-47 (1993); *Smith*, 494 U.S. at 877-79.

Under RFRA, the compelling interest test applies to any substantial burden on religious exercise, "even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a) (1994). The religious claimant need not prove deliberate or overt discrimination. Thus, the essential difference between the constitutional and statutory standards is in the threshold showing required to shift the burden of justification to the government. It is a variation on the familiar difference between intention and

effect. Any substantial burden on religion requires justification under RFRA; only deliberate or overt discrimination, including burdens that apply to religion but do not apply generally, requires justification under the Constitution.[1]

The only issue in this Court is the facial validity of the Act as applied to state and local governments. Every appellate court to reach the issue has upheld the Act as a valid exercise of Congressional power to enforce the Fourteenth Amendment.[2] As applied to federal law, RFRA has been upheld as a necessary and proper act to define the reach of other federal legislation. *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996)

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[1] The legislative history repeatedly cites burdensome land use regulation as examples of why the bill was necessary. S. Rep. No. 103-111 at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897; H.R. Rep. No. 103-88 at 6 n.14 (1993); *Hearings on H.R. 2797* (Serial No. 102-99) at 122 (1992) (Rep. Solarz); 139 Cong. Rec. S14353 (Oct. 26, 1993) (Sen. Hatch). Churches are landmarked at rates grossly disproportionate to secular properties. N.J. L'Heureux, Jr., *Ministry v. Mortar: A Landmark Conflict*, in Dean M. Kelley, ed., *Government Intervention in Religious Affairs 2* at 164, 168 (1986); *see* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401 (1991).

[2] *Flores v. City of Boerne*, Pet. App. 1a (Higginbotham, J.), *reh'g en banc denied without a poll of judges*, *id.* at 30a; *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996) (Posner, J.), *cert. pending*, No. 96-710; *State v. Miller*, 538 N.W.2d 573, 577 (Wis. App. 1995), *aff'd on other grounds*, 549 N.W.2d 235 (Wis. 1996) (upholding the religious liberty claim under the state constitution); *South Jersey Catholic School Teachers Ass'n v. St. Teresa Elem. School*, 675 A.2d 1155, 1167 (N.J. Super. App. Div.), *certification granted on other grounds*, 683 A.2d 1162 (N.J. 1996). For commentary supporting the validity of RFRA, see Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73, 90-95; Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 187-90 (1992); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029, 1053-85, 1095-99 (1993); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 62-68 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 245-54; Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 152-69 (1995).

(Buckley, J). The validity of RFRA as applied to federal law is not at issue in this case.

SUMMARY OF ARGUMENT

With respect to state and local governments, Congressional power to enact RFRA is found in §5 of the Fourteenth Amendment, which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." A long and unbroken line of cases in this Court holds that Congressional power to enforce constitutional amendments includes power to enact prophylactic rules that go beyond what the judiciary would enjoin on its own interpretation of the amendment.

The most familiar exercises of this power are the various Voting Rights Acts, which bar electoral practices with discriminatory results, and the 1972 Amendments to Title VII, which require state and local governments to justify employment practices with discriminatory effects. These laws are directly analogous to RFRA, because each created a statutory right protected against burdensome or discriminatory effects, supplementing a constitutional right protected only against deliberate or overt discrimination. This Court relied on this doctrinal structure in *Smith*, holding that the Constitution protects against religious classifications but not against laws with burdensome religious effects. 494 U.S. at 886 n.3.

The City first argues that Congress has no power to go beyond judicial interpretation of the Amendment. Then it concedes that that position is inconsistent with precedent, but it insists that RFRA is somehow uniquely different from all prior legislation enforcing constitutional amendments. It cannot explain how RFRA is unique, because dispensing with proof of deliberate or overt discrimination is the most familiar use of the enforcement power. The City's theory of remedial and substantive uses of the enforcement power does not accurately describe the cases; if Title VII and the Voting Rights Acts were remedial, then so is RFRA. The City's theory also errs by assuming that if any one substantive use of §5 is permitted, then any imaginable substantive use of §5 must be permitted. Undoubtedly there are limits to §5 power, but RFRA does not approach those limits.

Congress made ample findings to support RFRA. Congress

found that neutral laws burden religion, sometimes deliberately, that governmental motives are difficult to prove, and that specific exemptions in every statute are unworkable.

Section 5 power has most commonly been used to enforce the Equal Protection Clause. But this power is equally "plenary" when invoked to enforce the Due Process Clause and the incorporated rights contained in that clause. *Hutto v. Finney*, 437 U.S. 678, 693, 698-99 n.31 (1978).

The original understanding of the enforcement power is evidenced by the enforcement legislation enacted by the Congresses that proposed the Reconstruction Amendments. The laws that they enacted, and their debates on those laws, plainly show an understanding that the enforcement power was not confined to judicial interpretation of the amendments.

The enforcement power does not interfere with this Court's power to interpret the Constitution. *Smith* remains the law of the Constitution; Congress has created a separate statutory protection.

RFRA raises no serious issue under the Establishment Clause. The City's argument does not even cite this Court's unanimous decision upholding laws that exempt religious practices from burdensome regulation. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The City confuses the protection of religious liberty with the promotion of religion.

Liberty is most secure when all three branches have independent power to protect it; this is why Congress can expand but not contract the scope of Fourteenth Amendment liberties. By creating judicially enforceable statutory rights, Congress can call on powers of the judiciary that this Court was unwilling to invoke on its own. The resulting collaboration between the branches provides a stronger protection for liberty than either branch could provide alone. This is separation of powers at its best.

ARGUMENT

I. Congress Considered RFRA's Constitutionality, and Its Judgment Is Entitled to Reasonable Deference.

The issue is whether an Act of Congress is unconstitutional on its face. The Act is entitled to a "strong presumptive validity," *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32

(1963), and should be struck down only "for the most compelling constitutional reasons," *Mistretta v. United States*, 488 U.S. 361, 384 (1989), when there is "no room for reasonable doubt." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1872). In a "facial challenge," "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Deference is especially "appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Hearings in both Houses invited testimony pro and con on the constitutionality of the bill. *Hearing on S.2969* (Serial No. J-102-82) at 66, 92-97, 116, 122-25, 129, 172 (1992); *Hearing on H.R. 5377* (Serial No. 101-150) at 51, 54, 56, 72-79 (1990); *1992 House Hearings*, *supra* note 1, at 353-59, 373-74, 385-94, 397-99. The Congressional Research Service advised that Congress had power to enact RFRA under the Fourteenth Amendment with respect to the states and under the Necessary and Proper Clause with respect to the federal government. David M. Ackerman, *CRS Report for Congress: The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* 30-31 (Cong. Research Serv. Doc. 92-366A) (1992). Both Judiciary Committees considered the constitutional question and concluded that Congress had ample power. *See* S. Rep., *supra* note 1, at 13-14, 1993 U.S.C.C.A.N. at 1903; H.R. Rep., *supra* note 1, at 9. Senator Hatch, the lead Republican sponsor, explained the constitutional issue to the Senate. 139 Cong. Rec. S14470 (Oct. 27, 1993).

In short, RFRA represents the considered constitutional judgment of an equal and coordinate branch of government. It is presumed to be constitutional, and the burden is on the City to show that it is not.

II. RFRA Is a Valid Exercise of Congressional Power to Enforce the Fourteenth Amendment.

A. The Enforcement Power Is Not Confined to Judicial Interpretation of the Amendment to Be Enforced.

RFRA is a valid exercise of Congressional power to enforce the Fourteenth Amendment. That Amendment provides in §5: "The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article." Among the provisions of that article is §1, which provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." It is settled that the liberty protected by this Clause includes the free exercise of religion. *Smith*, 494 U.S. at 876-77; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see *infra* 36.

For more than a century, this Court has said that the Enforcement Clauses are as broad as the Necessary and Proper Clause. *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980) (Burger, C.J., White & Powell, JJ. (plurality)); *City of Rome v. United States*, 446 U.S. 156, 175 (1980). "Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents." *Civil Rights Cases*, 109 U.S. 3, 21 (1883) (discussing the Enforcement Clause of the Thirteenth Amendment). "[W]hatever tends to enforce submission" is within the enforcement power, unless forbidden by some other constitutional provision. *Ex parte Virginia*, 100 U.S. 339, 346 (1879). The power is "plenary within the terms of the constitutional grant." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Hutto v. Finney*, 437 U.S. 678, 698-99 n.31 (1978).

The power "to enforce, by appropriate legislation" is independent of the power to adjudicate. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966). Rather, "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J., Rehnquist, C.J., & White, J. (plurality)).

The standard of review is the broad rationality standard of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421, quoted and applied to the enforcement power in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). *Accord*, *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924); *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).

B. RFRA Adds Statutory Protection Against Burdensome Effects to Constitutional Protection Against Deliberate or Overt Discrimination.

What RFRA adds to constitutional protection for the exercise of religion is protection triggered by burden or effects. Government must justify substantial burdens on religious exercise; victims need not prove that the burden resulted from bad motive, overt discrimination, or a departure from neutral and generally applicable lawmaking. RFRA is thus parallel to several of the most familiar exercises of the enforcement power. Both the Voting Rights Acts and the employment discrimination laws add protections triggered by results or effects to protection triggered by overt discrimination or discriminatory intent. *See infra* 11-16. RFRA does the same.

It was this Court that first relied on the structural similarity between religious burdens and racial impacts:

> Just as we subject to the most exacting scrutiny laws that make classifications based on race, . . . so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington v. Davis*, 426 U.S. 229 (1976) . . . Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

Smith, 494 U.S. at 886 n.3 (most citations omitted).

This comparison is dispositive of Congressional power to enact RFRA. For although the Constitution does not require

heightened scrutiny of practices with disproportionate racial impact, Congress has entirely banned voting practices that produce discriminatory results, 42 U.S.C. §1973 (1994), and it has required the states to prove both "job related[ness]" and "business necessity" to justify employment practices with disproportionate effects, 42 U.S.C. §§2000e-2(a)(2) and 2000e-2(k) (1994). Similarly here, Congress can require states to justify practices "that have the effect of burdening a particular religious practice." *Smith*, 494 U.S. at 886 n.3. Indeed, this "is the only approach compatible with these precedents." *Id.*

Of course the statutory and constitutional versions of these rights vary in response to the nature of each underlying right and the range of circumstances in which claims can arise. Discriminatory results in the voting cases are not exactly the same as disparate impact in the employment cases, and a burden on a substantive right such as religious liberty is not exactly the same as a statistically disparate impact on a group entitled to equality. But whether the standard is burden, impact, effects, or results, the focus is on the bearers of the protected right and how they are affected by the law, not on the state's classification scheme, its motive, intent, or purpose, or other details of state behavior.

On the constitutional side of the comparison, this Court has implemented the ban on religious classifications with the requirement of neutral and generally applicable law. Laws that regulate only a few people are not generally applicable. Laws that exempt cases of secular hardship, or that require government to assess the reasons for regulated conduct, are not neutral and generally applicable. *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884. The inquiry into neutrality is not confined to the face of the challenged law, but includes comparisons with other laws that regulate or fail to regulate analogous conduct. *See Lukumi*, 508 U.S. at 537, 539, 543-45.

As with racial or sexual classifications, a jurisdiction's laws may discriminate against religion in one of these forbidden ways without there having been conscious governmental hostility to religion. *See Lukumi*, 508 U.S. at 559 ("special burdens" on religion are invalid even if the "legislature consists entirely of the purehearted") (Scalia, J., concurring); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) ("regardless of purported motivation,"

racial classifications require "extraordinary justification"). A law may discriminate against religion without a finding of bad motive even if the law does not mention religion, if, for example, the law provides exemptions for secular hardship and no exemptions for religious exercise. *See Sherbert v. Verner*, 374 U.S. 398 (1963), as explained in *Smith*, 494 U.S. at 884; *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 883-87 (D. Md. 1996) (invalidating, under *Smith*, an historic-district ordinance that was applied to a monastery and chapel but created exemptions for various secular interests).

These varied forms of discrimination reflect differences in the facts of cases and in the range of ways in which government can discriminate against religion. These variations do not affect the basic point: with respect to race, sex, and religion, the Constitution requires special justification for deliberate discrimination or for discriminatory classifications that appear on the face of the law. And with respect to race, sex, and religion, Congress can reduce the threshold showing required to shift the burden of justification, requiring the states to justify laws that have the effect of burdening a religious practice or a racial or sexual group. The constitutional standard may require justification of more cases in the religion context than in the race context -- "neutral and generally applicable law" versus "racial classification" simpliciter. But that difference merely reduces the gap between constitutional and statutory protection, making RFRA an easier case than Title VII or the Voting Rights Acts.

C. Congress Has Well-Settled Power to Dispense with Proof of Deliberate or Overt Discrimination.

Unable to argue from existing law, the City relies principally on dissents. There are a remarkable twenty-nine citations to dissenting opinions in the City's brief, most of them for key points. City Br. 11, 16, 22-24, 26-27, 36, 38-42, 45-46. If this Court were to accept either of the City's positions, the entire body of law on Congressional enforcement power would be called into question, and much of it would have to be overruled.

The City initially argues that §5 confers no power to go beyond judicial interpretation of §1, City Br. 26-28, 30-31. But that claim is plainly untenable, and eventually the City concedes

that "Congress has been permitted to enact prophylactic legislation that bans actions not forbidden by the Constitution for the purpose of enforcing constitutional guarantees." *Id.* at 33. But the City claims that RFRA is somehow different from all previous prophylactic legislation to enforce constitutional amendments.

The distinctions offered are conclusory and untenable: that RFRA is substantive and all previous enforcement acts were remedial, *id.* at 32-42, that all previous enforcement acts were specific and only RFRA enacts a general standard, *id.* at 25, 29-30 32, 47, that earlier enforcement acts were supported by Congressional factfinding but RFRA is not, *id.* at 35-38, that only RFRA responded to a decision of this Court, *id.* at 28-30. The City never defines the terms used in these distinctions -- substantive, remedial, general, specific, standard -- and these terms do not describe RFRA in any way that is not equally descriptive of much other legislation under the Enforcement Clauses. We begin with a review of this past legislation.

1. Prior Enforcement Legislation.

Vast portions of our law are based on Congressional power to enforce constitutional rights beyond what this Court is prepared to adjudge unconstitutional on its own. The following list is not exhaustive, but it illustrates the radical legal change that would follow from the City's arguments.

a. The Voting Rights Acts.

The principal technique of the Voting Rights Acts is to dispense with proof of deliberate or overt discrimination. These Acts are therefore direct precedent for RFRA.

1. The core provisions of the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.* (1970), created statutory rights to enforce the Fifteenth Amendment that went far beyond this Court's interpretation of the Amendment. The Act banned literacy tests for voting in most southern states, required federal approval for all new voting rules in those states, and authorized federal examiners to register state voters. The Court upheld these provisions in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and again upheld the ban on literacy tests in *Gaston County v. United States*, 395 U.S. 285 (1969). The Court upheld a facial ban on literacy

tests even though it had recently rejected the claim that literacy tests for voting were facially unconstitutional. *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45 (1959).

2. Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. §1973b(e) (1994), forbad English language literacy tests for voters who had graduated from an American flag school taught in a language other than English. This too required a different result from the constitutional result under *Lassiter*. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld the provision as a law to enforce the Fourteenth Amendment.

3. Section 201 of the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa (1994), banned literacy tests nationwide. The Court unanimously upheld this provision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), despite the lack of evidence that literacy tests had been misused in the newly covered states. *See id.* at 131-34 (Black, J.) (upholding nationwide ban on literacy tests without proof of discriminatory purpose); *id.* at 144-47 (Douglas, J.) (same, noting that Congress "need not make findings as to the incidence of literacy" (*id.* at 147)); *id.* at 216-17 (Harlan, J.) (same, relying on power to enforce the Fifteenth Amendment, "[d]espite the lack of evidence of specific instances of discriminatory application or effect" (*id.* at 216)); *id.* at 231-36 (Brennan, White, & Marshall, JJ.) (same, relying on power to ban practices with discriminatory effects); *id.* at 282-84 (Stewart, J., Burger, C.J. & Blackmun, J.) (same, joining Justice Black's opinion on this issue). *See Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (noting that in *Mitchell*, "[t]he Court was unanimous, albeit in separate opinions," in holding that Congress could prohibit voting tests with "discriminatory effects only") (Burger, C.J., Powell & White, JJ. (plurality)). This unanimity was reported in separate opinions because of disagreement about a more difficult issue, Congressional power to reduce the voting age. *See infra* 24.

4. Section 202 of the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa-1 (1994), limited state residency requirements for voting in Presidential elections. The Court upheld this provision as appropriate legislation to enforce the implicit constitutional right to interstate migration. *Mitchell*, 400 U.S. at 236-39 (Brennan, White, & Marshall, JJ.); *id.* at 285-92

(Stewart, J., Burger, C.J., & Blackmun, J.); *id.* at 147-50 (Douglas, J.) (appropriate legislation to enforce the right to vote). This result is constitutionally required under subsequent decisions, *Dunn v. Blumstein*, 405 U.S. 330 (1972), but in *Mitchell*, the Court upheld §202 on the basis of Congressional authority without deciding whether the Constitution required the same result.

5. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (1994), required most southern states to submit alterations of electoral practices with potentially discriminatory effects to the Department of Justice for pre-implementation review. The Court upheld this provision in *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980), as an appropriate means to enforce the Fifteenth Amendment, even though it held the same day that electoral practices with discriminatory effects do *not* violate the Constitution without proof of discriminatory intent, *City of Mobile v. Bolden*, 446 U.S. 55, 62-64 (1980).

6. The 1982 Amendments to §2 of the Voting Rights Act, 42 U.S.C. §1973 (1994), barred, nationwide, existing voting systems with discriminatory results. These amendments were "largely a response" to the Court's decision in *Bolden*. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Like RFRA, these Amendments enacted a broad standard drawn from prior constitutional interpretation, and that standard does not depend on the intent of those who designed the challenged electoral system. This Court upheld these Amendments, summarily but with concurring and dissenting opinions. *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984); *see Bush v. Vera*, 116 S.Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring).

b. The Civil Rights Act of 1964 and Amendments.

Many provisions of the Civil Rights Act of 1964 go beyond this Court's interpretation of the Constitution. As applied to state and local governments, all of these provisions depend on the 1972 Amendments, which extended Title VII to government employment. The City hinted below that these provisions might be explained away as Commerce Clause acts, but that position is untenable. Congress expressly rested the extension of Title VII to state and local employment on §5, and this Court upheld the extension based on §5. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453

n.9 (1976) (citing committee reports). *Fitzpatrick* and most of the other key cases interpreting and sustaining these Acts were decided between 1976 and 1985, when the Commerce Clause was unavailable to sustain the legislation. *Compare National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding state labor relations beyond reach of the Commerce Clause), with *Garcia v. San Antonio Met. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Usery*). This Court's continuing debate over *Usery* and *Garcia* makes the Commerce Clause theory as unreliable as it is ahistorical, and in any event, back pay, damages, and attorneys' fees would be unavailable to state employees if the legislation were based on the Commerce Clause. *See Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1128 (1996) (§5 does, but Commerce Clause does not, confer power to override Eleventh Amendment immunity).

Most important, it would turn federalism on its head to hold that Congress has more power to regulate the states under the Commerce Clause than under the Fourteenth Amendment. The foundation of this Court's federalism decisions is that Article I authorizes Congress "to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). But the Fourteenth Amendment is exactly the opposite; it is directed at states, and reaches individuals only derivatively. As then-Justice Rehnquist wrote for the Court:

> When Congress acts pursuant to § 5, not only is it exercising authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick, 427 U.S. at 456.

Some Title VII provisions dispense with proof of deliberate or overt discrimination. Others expand the definition of discrimination, or balance interests in ways different from how this Court balanced the same interests for constitutional purposes. (We number continuously from the list of Voting Rights Acts.)

7. The disparate impact provisions of Title VII, 42 U.S.C. §2000e-2(a)(2) and 2000e-2(k) (1994). The Constitution forbids only deliberate or overt discrimination in employment.

Washington v. Davis, 426 U.S. 229, 238-48 (1976). But Title VII requires employers to justify practices with disparate impact on women or minorities by showing "job related[ness]" and "business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i) (1994); *Connecticut v. Teal*, 457 U.S. 440, 445-51 (1982). Like RFRA, these provisions enact a broad standard to be applied to individual cases.

8. The Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (1994). This Court had held that pregnancy discrimination is *not* sex discrimination and that it violates neither the Constitution, *Geduldig v. Aiello*, 417 U.S. 484 (1974), nor Title VII, *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). Congress immediately responded with corrective legislation that defined sex discrimination to include pregnancy discrimination. The Act redefines sex discrimination, expanding on this Court's constitutional definition, and it applies to state and local governments in their capacity as employers a rule different from the constitutional rule announced in *Geduldig*.

9. The disparate treatment provisions of Title VII, 42 U.S.C. §2000e-2(a)(1) (1994), as applied to state and local pension and insurance plans. Section 5 empowers Congress to regulate sex discrimination in these plans, *see Fitzpatrick*, 427 U.S. at 448-50, and Title VII requires employers to use sexually integrated actuarial tables. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). This Court has never held that the Constitution requires that result, even though state law routinely authorizes the use of sex-segregated actuarial tables in insurance not sponsored by employers. There was no claim that employers acted out of bad motive in these cases, or that the ban on sex-segregated actuarial tables was a prophylactic rule to avoid some other violation. Rather, Congress reweighed the competing interests in sexual equality and in traditional insurance practice. This was a far more "substantive" exercise of §5 power than RFRA.

10. The religious accommodation provision of Title VII, 42 U.S.C. §2000e(j) (1994), requires employers to reasonably accommodate the religious practices of their employees if they can do so without undue hardship. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). Under *Smith*, the Constitution generally does not require such accommodation. This provision

too enacts a broad standard and dispenses with proof of deliberate or overt discrimination; it goes further than the disparate impact provisions by requiring affirmative efforts to accommodate the religious needs of employees.

11. The backpay and attorneys' fees provisions of Title VII, 42 U.S.C. §2000e-5(g) and (k) (1994). These sections overrode many decisions enforcing the states' Eleventh Amendment immunity from suits seeking to recover money from the state treasury. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Thus, it is not merely that the Constitution as interpreted by this Court does not *require* what the statute requires; rather, in the absence of the statute, the Constitution would affirmatively *forbid* what the statute requires. Such a provision would seem to be unconstitutional a fortiori under the City's reasoning. Even so, the Court upheld the states' monetary liability under the statute. *Fitzpatrick*, 427 U.S. at 453-56, reaffirmed in *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1125, 1128 (1996).

c. The Civil Rights Attorney's Fees Awards Act.

12. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988(b) (1994), authorizes awards of attorneys' fees against states in suits to enforce certain federal rights against state officials sued in their official capacity. This provision also overrides the state's Eleventh Amendment immunity. In *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978), the Court upheld the provision in a suit to correct cruel and unusual prison conditions, that is, in a suit to enforce a liberty incorporated into the Fourteenth Amendment. In *Maher v. Gagne*, 448 U.S. 122, 129-33 (1980), the Court unanimously held that Congress has §5 power to impose fee liability following settlement of a statutory claim pendent to a substantial constitutional claim, where by definition plaintiff had not proved and the court had not found a constitutional violation.

d. The Civil Rights Act of 1866 and Amendments.

13. The Civil Rights Act of 1866, 42 U.S.C. §§1981(a) and 1982 (1994), forbids private discrimination in the making of contracts and transfer of property. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968), the Court upheld this provision

as an exercise of power to enforce the Thirteenth Amendment. "Surely Congress has power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. *Accord, Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Congress has "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery"); *see Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75 (1989) (unanimously reaffirming the statutory holding in *Runyon*). Here Congress has proceeded by substantively redefining the scope of protection -- "determin[ing]" for itself what are the badges and incidents of slavery.

The Court in *Jones* did not decide whether the Thirteenth "Amendment *itself* did any more than" simply abolish slavery. 392 U.S. at 439. But other cases resolve that issue. "The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race." *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *see Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971) (rejecting claim that closing public facilities to avoid integration imposes a badge or incident of slavery).

14. The Civil Rights Act of 1991, 42 U.S.C. §1981(b) (1994), forbids private discrimination in the enforcement and administration of contracts. This Act amended the Civil Rights Act of 1866 and is presumably based on the same power, the power to enforce the Thirteenth Amendment. This provision goes as far beyond this Court's interpretation of the Thirteenth Amendment as the original Act.

e. The Civil Rights Act of 1871.

15. Section 2 of the Civil Rights Act of 1871, 42 U.S.C. §1985 (1994), provides a civil remedy for conspiracies to deprive any class of persons of equal rights, including First Amendment rights. *See United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1983), *infra* at 37. This Court unanimously upheld the provision, as applied to private violence against civil rights workers, as an

act to enforce the Thirteenth Amendment. *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971).[3]

f. The National Prohibition Act and Amendments.

16. Title II, §1 of the National Prohibition Act, 41 Stat. 305, 307-08 (1919), banned sales of beverages containing minute amounts of alcohol, beverages that the government "expressly admitted not to be intoxicating." *National Prohibition Cases*, 253 U.S. 350, 410 (1920) (Clarke, J., dissenting). The Court upheld this as a prophylactic means to enforce the Eighteenth Amendment, which applied only to "intoxicating liquors." 253 U.S. at 387-88. This appears to have been a clear substantive expansion beyond the scope of the Amendment.

17. Section 2 of the Supplemental Act banned many sales of alcohol for medicinal purposes, 42 Stat. 222 (1921), although the Amendment applied only to liquors sold for "beverage purposes." The Court upheld this measure unanimously. *James Everard's Breweries v. Day*, 265 U.S. 545, 558-60 (1924) (Congress "may adopt any eligible and appropriate means to make that prohibition effective"). This too may be conceived as a substantive expansion beyond the scope of the Amendment; it is perhaps better understood as a special case of dispensing with proof of motive.

2. The Lessons of Prior Enforcement Legislation.

Merely to list these statutes is to refute the City's claim that Congressional enforcement power cannot go beyond judicial interpretation of an amendment. To think about them at all is to refute the City's fallback claim that they are all distinguishable from RFRA. Here are seventeen distinct statutory provisions

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[3] Consider also the Senate version of the Civil Rights Act of 1875, 18 Stat. 335. A provision deleted in the House would have required desegregation of public schools. *See* 2 Cong. Rec., 43d Cong., 1st Sess. 3451 (1874) (text of Senate bill); *id.* at 4167 (defeat of separate-but-equal amendment); *id.* at 4176 (passage by Senate). By the City's theory, the Senate bill would have been unconstitutional at any time between *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). It would presumably have been unconstitutional before *Plessy* as well, but Congress could not have known that until the Court ruled.

(actually more, because several times we have discussed related provisions together) that clearly go beyond this Court's interpretation of the Constitution.

These statutes span 125 years of the nation's history; they were enacted from 1866 to 1991. This Court's consistent interpretation of the enforcement power extends over nearly as long a period. Congresses and Presidents have repeatedly relied on this understanding of legislative power.

These statutes and their interpretations are deeply embedded in our law. Americans who know little of the constitutional debate in this case have relied on these laws for protection against exclusionary voting rules, unnecessary testing requirements, discriminatory pension and insurance benefits, and loss of employment due to pregnancy. All of these protections would be cast in doubt if the judgment below were reversed; there cannot be a reversal without a drastic shrinkage of the enforcement power.

This case presents none of the criteria for such a dramatic departure from accumulated precedent. The enforcement power has not proved unworkable. It has not been undermined by subsequent developments. It has not been a source of Congressional abuse or overreaching; except for the period of massive resistance to desegregation, it has not even been especially controversial. The issue has not been overlooked or decided without full briefing. There are no irreconcilable tensions in the cases. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992) (discussing considerations affecting the weight of precedent); *Patterson v. McLean Credit Union*, 491 U.S. 164, 169-75 (1989) (same); *Lukumi*, 508 U.S. at 571-77 (Souter, J., concurring) (same).

Most of these statutes require results that are squarely inconsistent with decisions as closely in point as *Smith* is to RFRA. These statutes created statutory rights inconsistent with *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (voting systems with racial impact but no deliberate or overt discrimination); *Washington v. Davis*, 426 U.S. 229 (1976) (employment systems with disparate impact but no deliberate or overt discrimination); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (pregnancy discrimination); *Edelman v. Jordan*, 415 U.S. 651 (1974) (state liability to pay monetary compensation); *Lassiter v. Northampton*

County Board of Elections, 360 U.S. 45 (1959) (literacy tests); and *Corrigan v. Buckley*, 271 U.S. 323 (1926) (private discrimination in real estate).

These statutes are not narrow in scope. Some apply to all voting in the country. Others apply to all public employment in the country. Unlike RFRA, these statutes do not merely require occasional exemptions from state policies that remain generally enforceable; rather, these statutes fundamentally change voting and employment systems. Unlike RFRA, some of these statutes absolutely bar particular practices under some or all conditions: states get no opportunity to justify literacy tests, voting systems with discriminatory results, sex-based pension and insurance benefits, or disparate treatment on the basis of pregnancy. These statutes intrude far more deeply than RFRA into the core processes of state and local government.

Some of these statutes enact broad standards for courts to apply in individual cases; this is most obviously true in the Voting Rights Act definition of discriminatory results and in the Title VII provisions on disparate impact. Some of these standards permit states to justify challenged practices but only on stringent showings, such as business necessity or undue hardship. These standards are not constitutionally different from the compelling interest test, which is "strict in theory," not "fatal in fact." *Adarand Constructors v. Peña*, 115 S.Ct. 2097, 2217 (1995).

These statutes are not confined to protection of freed slaves and their descendants. They extend to Cubans, *Johnson v. De Grandy*, 512 U.S. 997 (1994), Jews, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), Arabs, *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), and Puerto Ricans, *Katzenbach v. Morgan*, 384 U.S. 641 (1966) -- even under legislation to enforce the Thirteenth Amendment. They extend to sex discrimination and pregnancy discrimination, even though Congress refused to prohibit sex discrimination in the Fourteenth Amendment. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U.L.Q. 161, 161-63. The Attorney's Fees Awards Act, the religious accommodation provision of Title VII, and 42 U.S.C. §1985 extend to incorporated rights. The City has utterly failed to show that RFRA is somehow uniquely different from all these other laws

that go beyond judicial interpretation of the amendments.

This listing also refutes Ohio's suggestion as amicus curiae that Congress can use its enforcement power only to eliminate "a prior or ongoing constitutional wrong" as defined by this Court. Ohio Br. 20. There is plainly no such wrong when Congress defines a badge or incident of slavery that this Court would not recognize on its own, or when Congress requires states to justify a height and weight requirement with disparate impact on women, *Dothard v. Rawlinson*, 333 U.S. 321, 323-32 (1977), or a civil service examination with disparate impact on minorities, or when Congress forbids discrimination against pregnant state employees or female pension beneficiaries.[4]

This listing also shows the incoherence of the City's distinction between "substantive" and "remedial" uses of the enforcement power. The ordinary meaning of "remedial" would be legislation that provides a remedy for a judicially determined violation. Some enforcement legislation is of this sort; it authorizes causes of action, damages, injunctions, and criminal penalties. *See* 42 U.S.C. §1983 (1994); 18 U.S.C. §242 (1994). But the statutes on the foregoing list are not of this type. These statutes enable plaintiffs to prove a *statutory* violation without ever showing anything that this Court would recognize as a

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[4] Ohio also argues that RFRA should be struck down to prevent prisoners from filing frivolous RFRA suits. Ohio Br. 2-6, 24-25. But prisoners file frivolous suits under every law that applies to them; that does not make every such law invalid. Just as a state cannot "reduce the adult population of Michigan to reading only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), so Congress need not reduce the free citizens of the United States to only those rights that prisoners cannot abuse. Congress has dealt with frivolous prisoner litigation, directly and across the board, in the Prison Litigation Reform Act, Pub. L. 104-134 (1996). The PLRA requires prisoners to exhaust administrative remedies, §803(d), 42 U.S.C. §1997e, and to pay filing fees in installments out of their prison trust accounts, §804(a)(3), 28 U.S.C. §1915(b). It denies the right to file claims or appeals to any prisoner who has had claims dismissed as frivolous on three or more occasions, §804(d), 28 U.S.C. §1915(g), authorizes judicial screening of prisoner claims, §805(a), 28 U.S.C. §1915A, and authorizes forfeiture of good time credit for prisoners who file malicious or harassing claims, §809(a), 28 U.S.C. §1932. The way to deter frivolous prisoner litigation is to effectively implement this and similar legislation, not to deprive Congress of its longstanding authority under the Enforcement Clauses.

constitutional violation. If there be any sense in which these statutes are remedial, RFRA is remedial in the same sense.

The ordinary meaning of "substantive" would be legislation that defines a statutory violation in some way different from this Court's definition of a constitutional violation. But a vast range of possible legislation is substantive in this sense, from dispensing with proof of defendant's state of mind to dispensing with every element of the judicial conception of the constitutional right and substituting a wholly different set of elements. The City erroneously assumes that all "substantive" uses of the enforcement power are indistinguishable -- that if Congress can enact any one "substantive" provision, then it can enact any imaginable substantive provision. But this is the fallacy of the excluded middle. Whether RFRA is characterized as remedial or substantive, two more tangible propositions remain true: RFRA is *not* distinguishable from much familiar legislation dispensing with proof of deliberate or overt discrimination, and RFRA would be easily distinguishable from many other imaginable uses of the enforcement power.

3. The Limits of the Enforcement Power.

The federal government is a government of limited powers, so of course there are limits to the enforcement power. This case does not require identification of those limits, because RFRA is so clearly within the bounds of familiar past uses of the power. But some limits are identified by this Court's cases, and other potential limits are readily identifiable on reflection. We start with the shared proposition that the Enforcement Clauses do not confer unlimited authority to legislate on any subject; they do not make Article I irrelevant.

It is commonly said that all legislation must be rational. The Due Process Clause protects against irrational restrictions on liberty, and the Equal Protection Clause protects against irrational classifications. If Congress could impose heightened scrutiny on any liberty interest or legislative classification that this Court would subject to rational basis scrutiny, the enforcement power might well be a route to general legislative power of unlimited scope. It is therefore a necessary inference -- an inference from constitutional structure -- that Congress has no such power.

Congressional enforcement legislation must have a nexus with a constitutional right that, in the judgment of this Court, is plausibly entitled to heightened scrutiny.[5]

RFRA raises no plausible issue concerning its connection to the Fourteenth Amendment, whatever test of nexus the Court might ultimately adopt. RFRA protects only conduct that is the exercise of religion within the meaning of the Constitution as interpreted by the judiciary. 42 U.S.C. §2000bb-2(4) (1994). Congress and the Court agree that religiously motivated conduct is the exercise of religion; this Court said in *Smith* that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." 494 U.S. at 877. Congress and the Court further agree that the compelling interest test protects religiously motivated conduct against laws that are not neutral and generally applicable. Congress added only that the same test protects the same conduct against laws that *are* neutral and generally applicable. Here, as in the race cases, Congress merely dispensed with proof of deliberate or overt discrimination, expanding protection for a right that already gets heightened judicial scrutiny in an important range of cases. The extent of protection has been increased, but the subject of protection has not changed. Judicial application of the compelling interest test to some burdens on religiously motivated conduct shows that such conduct is a special concern of the Fourteenth Amendment; legislative protection of such conduct cannot grow into general power to legislate on all subjects.

Congress has rarely tested the limits of the enforcement power, so the Court has had few occasions to squarely consider them. Four justices suggested that Congress cannot protect non-suspect classifications, *EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Burger, C.J., Powell, Rehnquist, & O'Connor, JJ.

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[5] Congress need not always await judicial decision. Congress banned sex discrimination in state and local employment in 1972, see *supra* 13, although this Court did not clearly announce heightened scrutiny for sex discrimination until 1976. *Craig v. Boren*, 429 U.S. 190 (1976). The sequence is not dispositive; what is critical is that this Court accepted the Congressional judgment that sex classifications are sufficiently like other classifications requiring special justification under the Fourteenth Amendment.

(dissenting)), but the majority did not reach the issue. Five justices suggested a similar limit, in a special context, in *Oregon v. Mitchell*, 400 U.S. 112 (1970). There the Court invalidated a law granting 18-year-old citizens the right to vote in state elections. Four Justices relied on the Constitution's express recognition of state voting rules, and Justice Harlan relied on what he considered to be the clear intent of the Framers to similar effect. *Id.* at 119-26 (1971) (Black, J.) (relying on Article I, §2); *id.* at 293-94 (Stewart, J., Burger, C.J., & Blackmun, J.) (relying on "the explicit provisions of Article I, Article II, and the Seventeenth Amendment"); *id.* at 152-213 (Harlan, J.) (reviewing legislative history at great length to show that Fourteenth Amendment does not apply to voting qualifications). Thus, the principal point in these opinions is that the enforcement power is subject to other express allocations of power in the Constitution.[6]

But *Mitchell* may not be fully explained by state power over voting rules, because this Court has repeatedly held that Congress sometimes can override state voting rules. Justice Harlan's view that voting is wholly outside the Fourteenth Amendment did not prevail, so there is necessarily a second thread to the argument of the Justices who held that §5 confers no general power over voting qualifications. At least in the context of voting rights, these Justices doubted Congressional power to define a suspect classification (youth) that had none of the usual judicial indicia of suspectness. Justice Stewart noted that persons aged 18 to 21 are not a "discrete and insular minority." *Id.* at 296. Justice Harlan found it "little short of fanciful" to believe that such persons were threatened with unconstitutional discrimination. *Id.* at 212. Justice Black denied that Congress could "prohibit every discrimination between groups of people." *Id.* at 127.

In *Mitchell* these comments were inextricably linked to state power over voting qualifications, a point these Justices elaborated at much greater length. But these comments also suggest the limit proposed here: Congress could not make youth a suspect

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[6] RFRA poses no issue under that limit; the Constitution recognizes no specific state power to burden or regulate religion. The powers affected by RFRA are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

classification unless this Court agreed that youth was sufficiently like other suspect classications to justify Fourteenth Amendment protection.

Any other exercise of an enforcement power must have a similarly reasonable nexus to a judicially determined right. Thus, Congress can define the badges and incidents of slavery, but Congress cannot call just anything a badge or incident. In the *Civil Rights Cases*, this Court acknowledged that Congress could treat inability to contract or hold property as badges or incidents, but it held that discrimination by innkeepers was too remote from slavery to be a badge or incident. 109 U.S. 3, 20-25 (1883).

Palmer v. Thompson, 403 U.S. 217 (1971), is important for the light it casts both on the power to define badges and incidents of slavery and on the meaning of *Oregon v. Mitchell*. The five Justices joining the opinion of the Court in *Palmer* were the same five who had combined, earlier the same Term, to strike down the 18-year-old vote in *Mitchell* (Burger, C.J., Black, Harlan, Stewart, & Blackmun, JJ.). The City claims that *Mitchell* somehow dramatically confined the enforcement power, but in *Palmer* we find these same five Justices reaffirming Congressional power to define badges and incidents of slavery far beyond judicial interpretation. After firmly rejecting the claim that closing swimming pools to avoid integration imposed a badge or incident of slavery that courts could identify, the Court continued:

> [A]lthough the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred H. Mayer Co.* could empower Congress to outlaw "badges of slavery." [quoting the Enforcement Clause] But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

Id. at 227. This is a clear reaffirmation of Congressional power to go far beyond judicial interpretation, by the same Justices who are supposed to have rejected that power in *Mitchell*. These Justices also joined Justice Stewart's opinion for a unanimous Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), upholding

42 U.S.C. §1985(3) (1994), and stating that Congressional power to enforce the Thirteenth Amendment "extend[s] far beyond actual imposition of slavery or involuntary servitude." *Id.* at 105. The City and its amici badly misread *Mitchell*, because they ignore the two prophylactic Acts upheld in that case, they ignore the heavy reliance on state power over voting rules in the opinions striking down the 18-year-old vote, they ignore Justice Stewart's statement that "Congress may paint with a much broader brush than may this Court," 400 U.S. at 284, and they fallaciously assume that if the 18-year-old vote was "substantive" and the Court struck it down, then the Court must strike down any other exercise of the enforcement power that can be labeled "substantive." *Palmer* and *Griffin* are contemporaneous proof that the five Justices who struck down the 18-year-old vote meant no such thing.

Another plausible limit, also suggested by four Justices, is that Congress has no power to forbid practices that it authorizes the federal government to engage in, because that authorization would imply that Congress does not really think the practices must be banned to enforce constitutional rights. *EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Burger, C.J., Powell, Rehnquist, & O'Connor, JJ. (dissenting)). RFRA raises no such issue. RFRA is fully applicable to all federal law, 42 U.S.C. §2000bb-3(a), and Congress did as much as it could to bind future Congresses. Future Congresses can of course amend RFRA with respect to both state and federal law, but if they amend it with respect to federal law, they must do it explicitly. 42 U.S.C. §2000bb-3(b) (1994). Congress cannot casually or inadvertently make new federal law exempt from RFRA.

Another limit is the substantial restrictions on Congressional authority to dispense with the state action requirement in legislation to enforce amendments that contain such a requirement. *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 830-33 (1983); *James v. Bowman*, 190 U.S. 127 (1903); *Civil Rights Cases*, 109 U.S. 3, 11-14 (1883).[7] The City relies heavily on the *Civil*

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[7] *But see District of Columbia v. Carter*, 409 U.S. 418, 423 n.8 (1973) (dictum that Congress may "proscribe purely private conduct under §5"); *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) (reserving the issue); *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, Black, & Fortas, JJ.); *id.* at 781-84

Cases, but they hold only that Congress cannot dispense with proof of state action. The state action requirement is textually explicit, it is definitionally and structurally central to all constitutional rights except the Thirteenth Amendment, and it is rarely difficult to prove. There is ample justification for this Court's distinction between proof of state motive, which Congress can and often does dispense with, and proof of state action, which Congress generally may not dispense with.

The most obvious limit on the enforcement power is that Congress has no power to violate any constitutional right adjudicated by the courts.

> We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); *accord, Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982). The enforcement power is sometimes described as a ratchet; more precisely, Congress can raise but not lower the baseline of protection provided by judicial interpretations of the Constitution. This follows from the universal rule that Congress cannot violate the Constitution as interpreted by the courts. This limitation is equally applicable whether Congress acts under an Enforcement Clause, the Commerce Clause, or any other power.

Thus, a law prohibiting or restricting the free exercise of religion would not be a law to enforce religious liberty. An application of RFRA that violates the Establishment Clause, if there be any such application, would be unconstitutional. The City's claimed fear that Congress might somehow use its enforcement power to violate religious liberty is therefore not a fear while this Court sits. RFRA in no way reduces this Court's power to enforce judicially recognized rights to religious liberty.

(Brennan, J., Warren, C.J., & Douglas, J.) (six Justices stating that Congress can ban private conspiracies to interfere with Fourteenth Amendment rights); *Ex parte Yarbrough*, 110 U.S. 651, 664-66 (1884) (upholding Fifteenth Amendment power to punish private violence to prevent voting in federal election); *infra* at 38-40 (reviewing evidence of original understanding).

This limit on the enforcement power was at issue in recent cases limiting the use of racial preferences in voting, employment, and government contracting. *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Adarand Constructors v. Peña*, 115 S.Ct. 2097 (1995). To the extent that white voters, workers, or contractors have a judicially enforceable right not to be disadvantaged because of race, Congress presumably has no power to "restrict, abrogate, or dilute" that right. "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring). But this Court expressly reserved that question in *Adarand*, 115 S.Ct. at 2114, and it appears to remain open.

No resolution of that issue would affect RFRA, and upholding RFRA would not prejudice the position of any Justice on either side of that issue. Justices who deny such power can rely squarely on footnote 10 of *Katzenbach v. Morgan*: Congress has power to protect constitutional rights, but it has no power to violate constitutional rights.

This discussion shows that what the City lumps together as "substantive" legislation in fact presents a series of questions about different kinds of protections for judicially protected rights. Can Congress increase protection for every interest protected by rational basis review in this Court? Certainly not. Can Congress forbid a classification that this Court would permit? Perhaps not. Can Congress ignore the state action requirement? Probably not. Can Congress expand the scope of constitutionally protected conduct or a constitutional concept? The badges-and-incidents cases suggest that it can, as does general acceptance of the Pregnancy Discrimination Act, but there are limits of degree; in any event, Congress has not done so here. Can Congress reject a proffered justification for burdening constitutional rights that this Court would have accepted? The pension cases imply that it can, but again, there may be limits of degree. Can Congress protect a right that this Court has refused to incorporate, such as the Second or Seventh Amendment? Perhaps not; it will be time enough to decide if Congress ever tries. Can Congress override countervailing constitutional rights or other express constitutional

allocations of power? Generally not; perhaps absolutely not.

Can Congress dispense with proof of deliberate or overt discrimination? That is the only question presented here, and the answer is clearly yes. No use of the enforcement power is better settled than this. Reaffirming this settled rule does not dictate any answer to the myriad of other questions not presented.

D. Congress Had Ample Basis for Its Judgment That Religious Exercise Requires Statutory Protection.

Congress created a substantial record of its reasons for believing that RFRA is necessary to enforce religious liberty. Congress "is not required to make formal findings" at all, *United States v. Lopez*, 115 S.Ct. 1624, 1631 (1995), but appropriate findings clarify the basis of legislation and simplify the judicial task. Such findings may be found in committee reports, which this Court has "repeatedly recognized [as] the authoritative source for legislative intent." *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *see Preseault v. ICC*, 494 U.S. 1, 17-19 (1990) (citing findings in committee reports). Evidence to support Congressional action may also be found in hearing testimony, *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964), or even in floor speeches. In *Katzenbach v. Morgan*, the only "findings" were in the floor speeches of individual members. 384 U.S. 641, 655-58 nn.16-18; *id.* at 669 & n.9 (1966) (Harlan, J., dissenting). The principle is simple: courts do not dictate how Congress conducts its business.

Three findings explain the need for RFRA and the solution chosen. First, Congress found that generally applicable laws burden religion and can be used for that purpose. S. Rep., *supra* note 1, at 5, 8, 1993 U.S.C.C.A.N. at 1894, 1897; H.R. Rep., *supra* note 1, at 2. Second, Congress found that litigation over governmental motives is not a reliable means of protecting religious liberty. *Id.* at 6. Third, Congress found that specific exemptions in individual laws are not a reliable means of protecting religious liberty. *Id.*; S. Rep. at 8, 1993 U.S.C.C.A.N. at 1897. These findings explain the problem to be solved and why other solutions would not work. Congress enacted the only remaining solution -- a generally applicable protection for religious liberty that dispensed with proof of motive and with the need to enact individual exemptions.

The Congressional findings on burden commingle two conclusions, either of which is sufficient to justify the Act. First, Congress found that without RFRA, government could use neutral and generally applicable laws to deliberately discriminate against religion, and that sometimes it would do so. Both Committees found that facially neutral laws had been used to burden religion through all or much of American history. *Id.* at 5 & n.3, 1993 U.S.C.C.A.N. at 1894-95 & n.3; H.R. Rep. at 2 & n.2. The Committees cited testimony that three of the greatest religious persecutions in American history -- that against the Mormons in the nineteenth century, that against the Jehovah's Witnesses in the 1930s and 40s, and the Ku Klux Klan's attempt to close Catholic schools in the 1920s -- had been based on facially neutral, generally applicable laws.

Congress also heard testimony about contemporary hostility between churches and secular interest groups, use of zoning laws to exclude minority faiths, "old-fashioned religious prejudice" against Jehovah's Witnesses, continuing discrimination against minority religions, indifference or hostility to religious needs, and hundreds of burdens on American Indian religious practices. *See 1992 House Hearings, supra* note 1, at 104, 107-08, 123-24, 149, 157-58, 326, 334-39, 436; *Senate Hearing, supra* p.6, at 5-6, 15-26, 71-78, 144-45, 246-50. Opinion surveys confirm the testimony and findings that hostility to minority religions still infects the democratic process. Only 12% of Americans say they would not like to have "blacks" as neighbors. George Gallup, Jr., *The Gallup Poll: Public Opinion 1989* at 63, 67 (1990). But 30% say they would not like to have "religious fundamentalists" as neighbors, *id.* at 76, and 62% say they would not like to have "members of minority religious sects or cults" as neighbors, *id.* at 77. A plurality (45%) have "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% have mostly or very unfavorable opinions of "members of religious cults or sects." George Gallup, Jr., *The Gallup Poll: Public Opinion 1993* at 75-76, 78 (1994). Congress has ample cause to suspect the reasons for laws that burden religion.[8]

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[8] Indeed, St. Peter Church is located where it is because religious hostility forced it to locate outside the original city limits of Boerne. Kendall County

Congress also feared that the victims of deliberate religious discrimination would not always be able to prove the fact. The House Judiciary Committee found that:

> After *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. Legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

H.R. Rep., *supra* note 1, at 6. This Court has noted its "reluctance to attribute unconstitutional motives to the States." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). Congress heard testimony that if legislators wanted to target a particular religion, "they would camouflage in a law of general applicability." *1992 House Hearings*, *supra* note 1, at 105. Even discriminatory classifications can be camouflaged, as this Court knows. In *Lukumi*, this Court unanimously found discrimination amounting to a violation of the "fundamental nonpersecution principle." 508 U.S. at 523. Yet it took six years of litigation to achieve that result, and the victims had not received a single vote in any lower court. If such flagrant discrimination is so hard to prove, how are churches to litigate cases of subtle discrimination?

Second, Congress concluded that substantial burdens on religious exercise violate religious liberty even if the burden is neutral and generally applicable and not badly motivated. From the perspective of believers, it makes little difference whether the prohibition is found in a discriminatory law or in a facially neutral law of general applicability. Either way, they must abandon their religious practice or risk criminal punishment. Either way, their religious exercise has been prohibited.

These Congressional judgments parallel two of the possible judgments held sufficient in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The Court said there that Congress might have questioned New York's motives for retaining its English language literacy requirement. *Id.* at 654. Alternatively:

> Congress might have also questioned whether denial of a right deemed so precious and fundamental in our

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Historical Comm'n, *A History of Kendall County Texas* 22 (1984).

> society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.

Id. at 654. Similarly here, Congress "questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of" achieving less-than-compelling state interests.

One or both of these judgments must underlie all the statutes in which Congress supplemented constitutional protection against deliberate or overt discrimination with statutory protection against discriminatory impact or effect. These laws make sense only on the ground that insufficiently justified effects sometimes result from forbidden motives that cannot be proved, or that insufficiently justified effects themselves violate the burdened right. These explanations go hand in hand, and the Court has not required Congress to choose between them.

The City's distinction between remedial and substantive theories of §5 appears to turn on this choice between Congressional explanations. The City concedes that if Congress dispensed with proof of deliberate or overt discrimination against religion because it believed that such discrimination exists, then its action was remedial and RFRA is valid. *See* City Br. 33 (conceding that Congress can find facts "at odds with Supreme Court determinations under *the same standard*"). But if Congress dispensed with proof of deliberate or overt discrimination against religion because it believes that such discrimination is unnecessary to a constitutional violation, then its action was substantive and RFRA is invalid. This is the apparently intended meaning of the City's contrasting statement that Congress cannot enforce "ends not guaranteed by the Constitution." *Id.*

This argument makes validity turn not on what Congress did, but on what Congress thought. What Congress did -- in RFRA, Title VII, and the Voting Rights Acts -- was dispense with proof of deliberate or overt discrimination. The City claims that Congress can do this for some reasons but not others; Congressional motive would be determinative. Ohio's brief makes this explicit: the alleged constitutional defect is that "What *motivated* Congress in passing RFRA was something different." Ohio Br. 8 (emphasis added). But it is settled that a permissible

exercise of Congressional power does not become impermissible if this Court disapproves of Congress's motives. *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810). The central distinction offered by the City and its amici is wrong as a matter of law.

It is also wrong as a matter of fact. The City's argument requires this Court to reject Congress's findings about the misuse of facially neutral laws. The City seems to think these findings were in error, or that misuse was not sufficiently widespread to justify legislation, or that findings on what the City calls the remedial theory somehow do not count if Congress also believed in what the City calls the substantive theory. But this Court cannot reject findings that have a rational basis, as these findings clearly do. And if Congress finds that facially neutral laws are sometimes misused, it is for Congress to balance costs and benefits and decide whether the frequency of such misuse is sufficient to justify legislation. When Congress chooses means, "this Court may not inquire into the degree of their necessity." *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924).

Nor is there a constitutional difference between the findings that led to RFRA and the findings that led to other enforcement legislation. The legislative history of the 1982 Amendments to the Voting Rights Act emphasized both sets of reasons, and repeatedly denounced this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. No. 97-417 at 15-43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192-221. The Senate Committee actually gave priority to the reason the City calls substantive:

> During the hearings, there was considerable discussion of the difficulty often encountered in meeting the intent test, but that is not the principal reason why we have rejected it. The main reason is that, simply put, the test asks the wrong question.

Id. at 36, 1982 U.S.C.C.A.N. at 214.

The Congress that amended Title VII in 1972 explicitly rejected the view that employment discrimination is principally a matter of bad motive. The Senate Report stated: "Experts familiar with the subject now generally describe the problem in

terms of 'systems' and 'effects' rather than simply intentional wrongs." S. Rep. No. 92-415 at 5 (1972). The House Report did not say that employers use civil service tests for the purpose of excluding minority applicants, or even that tests perpetuate past discrimination in education. Rather, the Committee found that minorities and other "culturally disadvantaged groups" perform less well on standardized tests "because of low incomes, substandard housing, poor education, and other 'atypical' environmental experiences." H.R. Rep. No. 92-238 at 20-21 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2156. Congress did not require justification of disparate impact as a way to police bad motive; rather, Congress believed that unjustified disparate impact is itself a form of discrimination that should be forbidden.

It is true that extraordinary state resistance to black voting rights preceded the Voting Rights Act of 1965. But such history is not needed to support the enforcement power, and is in fact anomalous among modern enforcement legislation. Variations on the RFRA pattern have been far more common: some bad motive, some hostile indifference, some suspicious but unprovable circumstances, some questionable classifications, some innocent but unjustified effects. There was no history of resistance to black voting rights or misuse of literacy tests in northern and western states to support the 1970 Voting Rights Act. Resistance to black voting had largely dissipated even in the south by the time of the 1982 Amendments, which were aimed at second and third generation voting rights problems. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1838-53 (1992) (analyzing the evolution of voting rights cases). State and local governments have myriad legitimate reasons, and also a range of more questionable but clearly non-racial reasons, for annexations, for at-large elections, and for drawing single-member districts one way instead of another. Yet all these devices are subject to challenge, preclearance, or both, under the original Voting Rights Act and its amendments.

Title VII is even less consistent with the City's theory. The extension of disparate impact provisions to state and local employment required justification of many employment practices adopted with no hint of bad motive, including civil service

examinations and size and strength requirements. Perhaps there are jurisdictions that designed civil service requirements to exclude minority employees, but the dominant history is quite different: merit appointment emerged as part of a great reform designed to eliminate serious abuses in patronage appointments. *See* Ronald N. Johnson & Gary D. Liedecap, *The Federal Civil Service System and the Problem of Bureaucracy* 12-47 (1994).

The City repeatedly suggests that Congress could enact legislation to protect specific religious practices, but that it cannot enact a general standard to protect all religious practices. City Br. 25, 29, 32, 47. This would be a wholly unprincipled restriction on Congressional discretion. Congress considered and rejected the possibility of specific statute-by-statute exemptions, and for good reason: such an approach can never achieve equal protection of the laws, especially for small and unpopular faiths.

Specific exemptions require churches to monitor pending legislation at every level of government, and to engage in perpetual legislative battles with other interest groups. Congress, which is surely expert on the legislative process, found that individual exemptions are unworkable:

> It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute.

H.R. Rep., *supra* note 1, at 6.

> State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths . . .

S. Rep., *supra* note 1, at 8, 1993 U.S.C.C.A.N. at 1897. This Court has acknowledged the point, recognizing that in a system of specific exemptions in each statute, "the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. Such selective exemptions are not only bad policy; they invite constitutional attack. This Court has been suspicious of narrow legislative exemptions that benefit only one or a few religious groups. *Board of Educ. v. Grumet*, 114 S.Ct. 2481, 2491-92 (1994) (rejecting an

accommodation because of its "anomalously case-specific nature"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (distinguishing Title VII requirement of religious accommodation from absolute protection for Sabbath observers, in part because Title VII protects "all religious beliefs and practices rather than protecting only the Sabbath observance").

RFRA provides the legislative protection for religious exercise that this Court contemplated in *Smith*. It does so in a way that avoids the discrimination among faiths that the Court feared was unavoidable, and it does so in the only way that Congress found to be legislatively feasible.

E. Power to Enforce the Fourteenth Amendment Includes Power to Enforce Religious Liberty.

Most of this Court's case law on §5 involves laws to enforce the Equal Protection Clause. This case involves a law to enforce the religious liberty component of the Due Process Clause, a right commonly said to be "incorporated" from the First Amendment.

It makes no difference. The Fourteenth Amendment is the only federal constitutional provision that protects religious liberty against the City of Boerne. The First Amendment does not apply to the states or their subdivisions. Rather, "the fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). If Congress is enforcing anything in this case, it is the Fourteenth Amendment.

Congress has power to enforce "the provisions" of the Amendment -- not one of them or some of them, but simply "the provisions." There is no basis to distinguish the Equal Protection Clause from the Due Process Clause. Speaking of another enforcement statute, this Court said:

> [N]o possible reason suggests itself for concluding that §241 -- if it protects Fourteenth Amendment rights -- protects rights secured by the one Clause but not those secured by the other.

United States v. Guest, 383 U.S. 745, 753 (1966). Twice this Court has said it has "no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by

the Due Process Clause of the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 789 (1966); *United States v. Williams*, 341 U.S. 70, 72 (1951).

Congress has enacted other laws to enforce provisions of the Bill of Rights that have been incorporated into the Fourteenth Amendment. The most obvious of these are 42 U.S.C. §1983 (1994), providing remedies for violations of federal rights under color of state law, and 42 U.S.C. §1988(b) (1994), providing for attorneys' fees. These provisions have been used to enforce rights incorporated from the First, Fourth, Fifth, and Eighth Amendments in thousands of cases.

The religious accommodation provision of Title VII protects the right to free exercise of religion. This provision goes well beyond what this Court would require by judicial interpretation, but no one has suggested that it is beyond the reach of §5. The Court also assumed that Congress has power to protect First Amendment rights in *United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1983), a suit alleging anti-union violence. The Court was closely divided on whether Congress can protect First Amendment rights against purely private action, but no Justice suggested that Congress could not protect First Amendment rights at all.

This Court has also upheld Congressional power to protect the right to travel. *Oregon v. Mitchell*, 400 U.S. 112 (1970), (*supra* at 12-13, upholding Congressional restrictions on residency periods for voting); *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971). No one thought it controlling that this right does not appear explicitly in the Fourteenth Amendment, or that it does not derive from the Equal Protection Clause.

Thus, it is well settled that §5 authorizes Congress to protect rights incorporated into the Fourteenth Amendment. And it is well settled that §5 authorizes Congress to provide greater protection for constitutional rights than this Court would provide on its own. RFRA merely combines these two settled features of the enforcement power, using both in a single statute. *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978), is precedent for this combination, overriding the Eleventh Amendment to enforce incorporated rights. *Mitchell* is also precedent for this combination, for when it was decided in 1970, this Court had not yet invalidated durational residency requirements.

F. The Original Understanding Supports a Broad Enforcement Power.

The original understanding of the Reconstruction-era Enforcement Clauses is evidenced in the debates over each Amendment and also in the debates over enforcement legislation. The Congresses that proposed the Amendments, and their immediate successors with many of the same members and leadership, repeatedly debated the scope of the newly conferred powers. This much is common ground. *See* Brief of Clarendon Foundation in Support of Petitioner at 10, relying on the "far more detailed" debates of 1871 to show the meaning of §5, proposed in 1866. The constitutional issue was not neglected, and control did not shift until March 1875 (*after* the 1875 Civil Rights Act).

The enforcement legislation of these Reconstruction Congresses shows that the original understanding of the enforcement power went well beyond the literal meaning of all three Reconstruction Amendments, and also well beyond this Court's ultimate interpretation of those Amendments. These Congresses repeatedly enacted legislation that regulates private conduct, thus going beyond the Fourteenth and Fifteenth Amendments, and that requires far more than a mere end to slavery or involuntary servitude, thus going beyond the Thirteenth Amendment. Examples include the Civil Rights Act of 1866, *supra* at 16-17, which forbids private discrimination with respect to contracts and property; the Enforcement Act of 1870, 16 Stat. 140, the surviving section of which is now codified at 18 U.S.C. §241 (1994), which forbids private conspiracies to violate federal rights; §2 of the Civil Rights Act of 1871, *supra* at 17-18, which forbids private conspiracies to deprive any class of persons of equal rights; and the Civil Rights Act of 1875, 18 Stat. 335, which forbad private discrimination in places of public accommodation. The debates reflect a range of theories, but this legislation, all enacted at least by a simple majority and some of it enacted by a two-thirds majority, necessarily reflects the then-prevailing understanding of the enforcement power.

This Court struck down some of these enactments, *Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the 1875 Act), and upheld others on theories narrower than those apparently intended by the enacting Congresses, *Jones v. Alfred H. Mayer*

Co., 392 U.S. 409 (1968) (upholding 1866 Act only under the Thirteenth Amendment); *United States v. Guest*, 383 U.S. 745 (1966) (opinion of the Court reserves the constitutionality of the 1870 Act as applied to private action, although six Justices affirm its constitutionality in separate opinions); *Griffin v. Breckenridge*, 403 U.S. 88, 104-07 (1971) (upholding the 1871 Act only under the Thirteenth Amendment, reserving the Fourteenth Amendment issue). These decisions are relevant to arguments from precedent, but the precedent is overwhelming that Congress can enact RFRA. *See supra* 10-29. The City's amici seek to overturn settled precedent with an appeal to original understanding. The evidence of original understanding is that Reconstruction Congresses enacted these laws, not that this Court struck some of them down.

Congress first joined issue over whether the Enforcement Clause of the Thirteenth Amendment authorized the Civil Rights Act of 1866. The sponsors argued that it did, because the Act banned the badges and incidents of slavery. Cong. Globe, 39th Cong., 1st Sess. 41 (1865) (Sen. Sherman); *id.* at 474-75 (1866) (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.* at 1159 (Rep. Windom). Some moderate Republicans rejected this theory; it is common ground that one purpose of the Fourteenth Amendment was to remove doubt about the validity of the Civil Rights Act. Clarendon Br. 9; Cong. Globe, 39th Cong., 1st Sess. 2498 (1866) (Rep. Broomall); *id.* at 2542 (Rep. Bingham). But the Fourteenth Amendment has a state action requirement, so if Congress were confined to the constitutional text, that Amendment would not solve the problem either. The Civil Rights Act required Congressional power to go beyond the text of either Amendment.

Similar debates surrounded each successive bill. Congress acted on the view that the enforcement power should and did have limits, and that it should not and did not confer a general power to substitute federal law for state law. The City's amici rely on speeches to this effect. Clarendon Br. 5-12. But again they commit the fallacy of the excluded middle: Many prophylactic rules to achieve the purposes of the Amendments fall far short of general power to substitute federal law for state law.

Thus, moderate Republicans criticized an early draft of the Civil Rights Act of 1871 because it could be read as making a federal crime and tort of every offense on a long list of offenses.

Cong. Globe., 42d Cong., 1st Sess. app. 113 (1871) (Rep. Farnsworth). Yet the critics voted for the bill after it was amended to require that the crime or tort be motivated by a desire to interfere with equal protection of the laws or the privileges and immunities of citizens. *Id.* at 522. The final bill applied to private conduct, and except for the state action requirement, it tracked the Fourteenth and Fifteenth Amendments, which it was meant to enforce. Yet it passed, and Reps. Farnsworth and Garfield, so heavily relied on by the City's amici, both voted for it. *Id.* They believed that the enforcement power should not be allowed to grow into a general legislative power, but they plainly did not believe that it was confined to the judicially enforceable meaning of the Amendments.

This Court has already reviewed the legislative history on which the City's amici rely. *Kush v. Rutledge*, 460 U.S. 719, 724-27 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 96-103 (1971). Each time, the Court unanimously and correctly concluded that the Congressional purpose was to avoid enacting an "open-ended" or "general federal tort law." 460 U.S. at 725; 403 U.S. at 102. The City's amici show no more than this.

RFRA does not violate these limitations in the original understanding. It does not enact uniform federal law or generally displace state law; it does not create a general federal tort law. State and local governments are free to enact any policy and to enforce it against anyone whose violation is not religiously motivated. When a law burdens a religious practice, the governmental unit can repeal the law; it can narrow the law for everyone in a way that excludes the religious act; it can exempt the burdened religious exercise; it can justify the burden on religion; or it can craft some combination of these alternatives.

Space does not permit a careful review of the debates of the Reconstruction era, but many statements support the broad view of the enforcement power taken in the early legislation and in this Court's precedents. Those Congressmen had lived through *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), and they did not trust the Supreme Court to rule on the constitutionality of Reconstruction, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Some of them naturally argued that the enforcement power was

needed because judges might not enforce the new Amendments.[9] They argued that the courts had not enforced the Privileges and Immunities Clause of Article IV.[10] Others argued that the enforcement power would add nothing if it were confined to the judicially enforceable meaning of the Amendment.[11] Others urged in strong terms that Congress must be the judge of what legislation was "appropriate" to enforce the Amendments.[12] Others emphasized that Congress had power to do whatever was necessary, or power to enforce the end, object, spirit, or principles of the Amendments.[13]

Rep. Wilson argued that the Amendment was not confined to facially discriminatory laws, for such laws "would be an insult to the age, and could not, therefore, have been contemplated by the framers of this article." Cong. Globe, 42d Cong., 1st Sess. 482 (1871). Sen. Pool offered a form of the ratchet explanation of the enforcement power, arguing that Congress is limited when it acts "for the purpose of restraining liberty," but that it is much less limited when it acts for "the purpose of securing and protecting the liberty of the citizen, and the rights and immunities of American citizenship." *Id.*, 41st Cong., 2d Sess. 3611 (1870).

The framers also intended §5 to authorize enforcement of

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[9] Cong. Globe, 41st Cong., 2d Sess. 3568 (1870) (Sen. Sherman); *id.* at 3654-55 (Sen. Howard); *id.*, 42d Cong., 1st Sess. app. 229 (1871) (Sen. Boreman).

[10] *Id.*, 39th Cong., 1st Sess. 41 (1865) (Sen. Sherman); *id.* at 1034 (1866) (Rep. Bingham); *id.* at 1054 (Rep. Higby); *id.* at 2961 (Sen. Poland).

[11] *Id.*, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe); *id.*, 42d Cong., 2d Sess. 525 (1872) (Sen. Morton); *id.* at 762 (Sen. Carpenter); 2 Cong. Rec., 43d Cong., 1st Sess. 4085 (1874) (Sen. Carpenter).

[12] Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.*, 39th Cong., 2d Sess. 345 (1867) (Rep. Kasson); *id.*, 42d Cong., 1st Sess. 322 (1871) (Rep. Stoughton); *id.* at 393 (Rep. Smith of New York); *id.* at 482-83 (Rep. Wilson); *id.* at app. 70 (Rep. Shellabarger); *id.*, 42d Cong., 2d Sess. 728 (Sen. Sumner); 2 Cong. Rec., 43d Cong., 1st Sess. app. 358 (1874) (Sen. Morton).

[13] Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull); *id.*, 41st Cong., 2d Sess. 3563 (1870) (Sen. Carpenter); *id.*, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe); *id.*, 42d Cong., 2d Sess. 761 (Sen. Carpenter); 2 Cong. Rec., 43d Cong., 1st Sess. app. 358 (1874) (Sen. Morton).

what we now call incorporated rights. The anti-slavery movement retained strong religious elements throughout its history. For many Congressional opponents of slavery, some of the most important of slavery's many evils were that slave states restricted religious meetings and deprived slaves of the Scriptures. Thus, the protection of religious liberty was a central part of the agenda of Reconstruction. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U.L. Rev. 1106, 1131-37, 1145-49 (1994). This history is part of the social and political background to the explanation of §5 on the floor of the Senate.

Senator Howard introduced the revised draft of the Fourteenth Amendment, on behalf of the Joint Committee on Reconstruction. Cong. Globe, 39th Cong., 1st Sess. 2764-65 (1866). He treated the grant of Congressional power to enforce the Bill of Rights as an important feature of the Amendment. After stating that the privileges and immunities of citizens of the United States included the provisions of the first eight amendments, he continued:

> Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. . . . [T]hey stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them . . . As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out *all* the principles of *all* these guarantees, a power not found in the Constitution.

Id. at 2765-66 (emphasis added).

Rep. Bingham, the lead sponsor in the House, was equally clear in his closing speech summing up the first draft of the

Amendment. *Id.* at 1088-90.[14] Congress generally relied on the Privileges and Immunities Clause as the vehicle of incorporation; this Court has chosen the Due Process Clause. But Congress and the Court agree on the essential point: the Fourteenth Amendment protects religious liberty against the states, and Congress has power to enforce that protection by appropriate legislation.

III. RFRA Does Not Infringe on the Judiciary's Power to Interpret or Apply the Law.

The City argues that RFRA violates separation of powers, by directing this Court's interpretation of the Free Exercise Clause. This argument is just a relabeling of the claim that Congressional power under the Enforcement Clauses is confined to judicial interpretation of the amendments to be enforced. Once it is clear that the enforcement power is not so confined, then it is equally clear that legislation under the Enforcement Clauses will sometimes lead to results in particular cases different from the results that would have obtained in the absence of legislation. This is not a separation-of-powers violation; it is the natural result of each branch exercising its own separate powers.

Congress simply enacted new legislation, creating new law to be applied in future cases. An independent judiciary will interpret and apply this new law as it interprets and applies all new laws. Every time Congress legislates, it intends that some future cases will be decided differently from how they would have been decided under prior law without the new statute. RFRA is at most

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[14] To similar effect, see *id.*, 42d Cong., 1st Sess. 475-76 (1871) (Rep. Dawes); *id.* at 486 (Rep. Cook) (freedom of speech); *id.* at 499 (Rep. Frelinghuysen) (just compensation); *id.* at 567 (Sen. Edmunds) (Catholics and Methodists protected); *id.* at app. 84 (Rep. Bingham); *id.* at app. 310 (Rep. Maynard); *id.*, 42d Cong., 2d Sess. 762 (1872) (Sen. Carpenter) ("right of preaching the gospel" protected); 2 Cong. Rec., 43d Cong., 1st Sess. 384-85 (1874) (Rep. Miller); *id.* at 420 (Rep. Herndon); *id.* at app. 242 (Sen. Norwood); *see* Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye) (arguing that Necessary and Proper Clause already authorized Congress to enforce the Bill of Rights against the states); *id.* at 1629 (Rep. Hart) (arguing that Republican Form Clause obligated Congress to enforce the Bill of Rights against the states); *see generally* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986).

a pointed example of this universal fact of legislation. But pointed legislation is not unconstitutional. A new law may focus on a narrow range of issues, or even on a single case, without being invalid. Indeed, this Court has unanimously upheld legislation designed only to change the result in particular pending lawsuits. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992).

Compared with *Robertson*, RFRA does not even present an arguable separation-of-powers question. RFRA mentions specific cases only in the Congressional findings, not in the operative provisions of the statute. The committee reports expressly disclaimed any intention to codify the results of particular past cases or to dictate results in particular future cases. S. Rep., *supra* note 1, at 9, 1993 U.S.C.C.A.N. at 1898; H.R. Rep., *supra* note 1, at 7. Congress did not seek to reopen the final judgment in *Smith* or in any other case. Thus, *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1995), holding that Congress cannot direct the reopening of final judgments, has no application.

Nor did Congress attempt to change this Court's interpretation of the Constitution. It is undisputed that *Smith* remains the law of the Constitution. In this very case, Count I alleges a violation of RFRA and Count II alleges a violation of the Free Exercise Clause as interpreted in *Smith*. No one has suggested at any point that RFRA affected the meaning of *Smith* or the Free Exercise Clause. The committee reports are absolutely clear on this. The Senate Committee stated:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition . . .

S. Rep., *supra* note 1, at 14 n.43, 1993 U.S.C.C.A.N. at 1904 n.43. Similarly, the House Committee stated that "H.R. 1308, the Religious Freedom Restoration Act of 1993, responds to [*Smith*] by creating a statutory right." H.R. Rep., *supra* note 1, at 1.

Occasional Congressional comments to the effect that the bill would reverse, override, or overturn *Smith* were simply verbal shorthand for this creation of a statutory standard that would lead

to a different result in future cases. For example, Rep. Hyde said that the bill "will overturn" *Smith*. 139 Cong. Rec. H2357 (May 11, 1993). Three paragraphs later, he elaborated:

> Of course, the label restoration is inappropriate in this context since the Congress writes laws--it does not and cannot overrule the Supreme Court's interpretation of the Constitution. We are unable to restore a prior interpretation of the first amendment. H.R. 1308 is a proposed Federal statute . . .

Id. at H2358. His elaboration makes clear that he understood precisely how the bill worked, and that he did not intend anything different when he said that the bill would "overturn" *Smith*.

There is no room for doubt about what the statute does or how it works. But if there were an ambiguity, it would be immediately resolved by basic canons of statutory construction. Statutes are to be construed, if fairly possible, in ways that avoid constitutional difficulty, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979), and in ways that do not render them "inoperative," *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 n.22 (1986), "ineffective," *United States v. Powers*, 307 U.S. 214, 217 (1939), or "nugatory," *United States v. Tappan*, 24 U.S. (11 Wheat.) 419, 426 (1826).

The text of RFRA reads as a statutory right, and the committee reports explain it as a statutory right. To avoid this straightforward interpretation, and construe it instead as an obviously invalid attempt to change the meaning of the Constitution without a constitutional amendment, is to search out a bizarre interpretation in order to destroy the statute. But such an interpretation would be plain error, for "the cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

IV. RFRA Does Not Violate the Establishment Clause.

The City briefly argues that RFRA violates the Establishment Clause, but this is close to frivolous. We doubt that this Court has ever before heard an Establishment Clause claim with the

leading organizational defenders of that Clause on the other side.[15]

RFRA exempts religiously motivated conduct from burdensome regulation. This Court has unanimously upheld such exemptions against Establishment Clause attack, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), and it affirmatively invited such exemptions in *Smith*, 494 U.S. at 890. The City cannot distinguish *Amos*; the case is not even cited in the Argument section of its brief. City Br. at 11-49.

The City's argument confuses the advancement of religious liberty with the advancement of religion. RFRA does not require government to subsidize religion, benefit religion, or make religion in any way better off than it would be if government had done nothing; it requires only that religious conduct sometimes be left unregulated. RFRA is triggered only when government imposes a "substantial burden" on a religious practice, 42 U.S.C. §2000bb-1(b) (1994), and it requires only that government justify the burden or refrain from imposing it. Failing to burden religion is no establishment; government does not establish a religion by leaving it alone.

> [T]he Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.

Board of Educ. v. Grumet, 114 S.Ct. 2481, 2492 (1994).

> It is well established, too, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."

Amos, 483 U.S. at 334, quoting *Walz v. Tax Comm'n*, 397 U.S.

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[15] Americans United for Separation of Church and State, the American Civil Liberties Union, People for the American Way, the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League are all members of the Coalition for Free Exercise of Religion, and have all joined in the Coalition's amicus brief in support of Respondents.

664, 673 (1970). Thus, RFRA does not establish religion by requiring exemptions in circumstances where the Free Exercise Clause would not require such exemptions of its own force.

Amos and similar decisions necessarily reject each of the City's Establishment Clause arguments. Exempting religious exercise from burdensome regulation has the secular purpose and effect of protecting liberty. There is no implied endorsement; a decision to protect religious liberty implies no view about the value of religion in general or of any religion in particular. The avoidance of human suffering, and deference to beliefs that are usually far more important to the individual than to the state, are wholly adequate secular reasons for protecting religious liberty. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313 (1996). Regulatory burdens discourage religious exercise, but exemptions neither encourage religion nor discourage it; they are substantively neutral. *Lukumi*, 508 U.S. at 559-63 (Souter, J., concurring). By holding that the Constitution does not require religious exemptions, but that legislatures can enact them, this Court has in effect held that legislatures may choose either formal or substantive neutrality toward religion. Congress has chosen substantive neutrality. This is a form of neutrality entirely consistent with the Establishment Clause.

We have already discussed, *supra* at 35-36, the City's suggestion that exemptions for particular religious practices would be permissible but that RFRA's generally applicable standard for exemptions is not. Not only did Congress expressly find that specific exemptions are unworkable, but the City's whole argument is backwards. It guarantees chronic political battles between churches and other interest groups for individual exemptions, and it guarantees discrimination against the faiths that cannot win such battles. Generality is an Establishment Clause virtue, not a vice. *See Board of Educ. v. Grumet*, 114 S.Ct. 2481, 2491-93 (1994). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Congress thus acted on the highest Establishment Clause principles when it accepted the lead House sponsor's plea that it not succumb

to the temptation to pick and choose among the

> religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular . . .

1992 House Hearings, supra note 1, at 124 (Rep. Solarz).

Congress did not put this point in constitutional terms, but it could have: RFRA is in fact a law to enforce the Establishment Clause. RFRA will reduce the inevitable discrimination among religious practices that would result from leaving the problem of regulatory burdens on religion wholly to the political process.

The City's entanglement argument is a figment of its own imagination. The City need not keep files on the religious practices of its population; it need only respond when the need for exemption is brought to its attention. It can grant such exemptions administratively, by prosecutorial discretion, or by amending the burdensome ordinance. The City appears to concede that exemptions granted by state law and "narrowly tailored" federal exemptions are permissible, City Br. 45, 47, but this is inconsistent with its argument. Whether exemptions are granted under RFRA or individually, whether granted by federal, state, or local law, and whether granted judicially, administratively, or legislatively, any exemption requires some government official to satisfy himself that the claimed religious practice is sufficiently sincere and important to justify an exemption. If such determinations violated the Establishment Clause, narrow exemptions and state-law exemptions would violate the Clause equally with RFRA. They do not, and RFRA doesn't either.

V. The Enforcement Power Is Part of the Genius of Separation of Powers.

Separation of powers is not an end in itself; it is an essential means "to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). It is "necessary to control the abuses of government." *The Federalist* No. 51 at 322 (Madison) (Clinton Rossiter ed. 1961). Our Constitution is designed to protect liberty and limit abuse of power; it is biased in favor of liberty.

If all three branches of government have independent power to protect liberty, the odds are increased that at least one branch will do so. If all three branches must at least acquiesce in

suppression, liberty is less likely to be suppressed. In short, the more independent repositories of power to protect liberty, the safer liberty will be. This is the source of the ratchet effect of §5: the fact that Congress can expand but not contract liberty is a function of giving all three branches power to protect liberty.

Congress in 1866 faced a particularly acute case of the inability to trust any government agency with our liberties. Who could be trusted to enforce the rights of freed slaves in particular, and the rights of all citizens against state governments in general? Certainly not state governments, especially in the south; they had been the source of the problem. Not the President, who had vetoed the Civil Rights Act and opposed the whole Congressional program of Reconstruction. Not the judges, who were appointed by the President and who had decided *Dred Scott*. Not even Congress itself: Congress feared that when the seceded states were readmitted to Congress, a majority of southerners and northern Democrats would repeal all the civil rights bills. Cong. Globe, 39th Cong., 1st Sess. 168 (Rep. Howe); *id.* at 1095 (Rep. Hotchkiss); *id.* at 2459 (Rep. Stevens); *id.* at 2462 (Rep. Garfield); *id.* at 2540 (Rep. Farnsworth). It was essential to secure the new rights before the southern states were readmitted.

The Congressional response was to create as many enforcement mechanisms as possible. Section 1 of the Fourteenth Amendment is self-executing; it created judicially enforceable rights beyond the reach of future Congresses to repeal. Section 5 conferred independent power to enforce the Amendment "by appropriate legislation." Action under §5 would be vulnerable to future Congresses, but not so vulnerable to judicial neglect. If the judiciary gave narrow or hostile interpretations, Congress could respond with more specific legislation.

If the judges acted vigorously under §1, *or* if Congress acted vigorously under §5, the new rights would be safe. But if neither branch enforced the new rights, the Amendment would be a failure. This was not just a theoretical risk. "[F]or many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes was concerned." *United States v. Price*, 383 U.S. 787, 801 n.9 (1966). Multiple authorities to enforce the Amendment could improve the odds but not could ensure success.

Each branch brings different strengths to the task of protecting liberty. The judiciary's insulation from the normal political processes, and its obligation to consider every case brought before it, are essential virtues in protecting religious minorities. But in the difficult balancing of interests required by some free exercise cases, this Court felt the need for a majoritarian voice. *Smith*, 494 U.S. at 890. By creating judicially enforceable statutory rights, Congress has called on powers of the judiciary that the Court was unwilling to invoke on its own. Because the rights created are statutory, Congress can retain a voice that it could not have retained if the Court had acted alone. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress has greatly reduced the danger that legislative bodies will overlook the needs of small or unpopular faiths. If Congress and the judiciary cooperate in this way, then the Court's fears need not come to pass; the oppression of small faiths need not be an "unavoidable consequence of democratic government." *Id.*

CONCLUSION

The judgment of the Court of Appeals should be affirmed, and the case should be remanded for trial of plaintiff's claim under the Religious Freedom Restoration Act.

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January 10, 1997

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 95-2074

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS, PETITIONER

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

AND

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, is a constitutional exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-2074

CITY OF BOERNE, TEXAS, PETITIONER

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

AND

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 73 F.3d 1352. The opinion of the district court (Pet. App. 24a-29a) is reported at 877 F. Supp. 355.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. A petition for rehearing was denied on March 28, 1996. Pet. App. 30a-31a. The petition for a writ of certiorari was filed on June 25, 1996, and was granted on October 15, 1996. 117 S. Ct. 293. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, U.S. Const. Amends. I, X and XIV, and the Religious

Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, are reproduced in the appendix to this brief.

STATEMENT

1. *Statutory framework*

a. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. The "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4).

A person whose rights under RFRA have been violated "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c).[1] RFRA's mandate applies "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA's enactment. 42 U.S.C. 2000bb-3(a).[2] RFRA does not "affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion." 42 U.S.C. 2000bb-4.

b. Congress enacted RFRA following this Court's decision in *Employment Division, Department of Human*

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[1] RFRA identifies the "government[s]" subject to its terms as any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. 2000bb-2(1). RFRA also applies to all territories and possessions of the United States. 42 U.S.C. 2000bb-2(2).

[2] All federal laws enacted after RFRA's passage are subject to its terms "unless such law explicitly excludes such application." 42 U.S.C. 2000bb-3(b).

Resources v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id.* at 877-882. Under *Smith*, generally applicable laws may be applied to religious exercises even when not supported by a compelling governmental interest. *Id.* at 884-889.

In enacting RFRA, Congress expressed concern about the effect of the *Smith* decision on the exercise of religion and, in particular, on minority religions. 42 U.S.C. 2000bb(a); see S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993). After holding hearings and collecting evidence, Congress concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. 2000bb (a)(2). See *The Religious Freedom Restoration Act: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 5-6, 63-64 (1992) (*1992 Senate Hearing*) (describing impact of general, neutral laws on Hmongs, Catholics, Mormons, and Jehovah's Witnesses); *Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 17-18, 24-25, 123, 408 (1992) (*1992 House Hearings*) (neutral laws impede religious practices of Amish, Jehovah's Witnesses, Catholics, Mormons, and Native Americans); S. Rep. No. 111 at 4-5, 8; H.R. Rep. No. 88, 103d Cong., 1st Sess. 2, 5-6 (1993).

In addition, Congress concluded that legislation was needed to secure for minority faiths the same ability to exercise their religion as more established faiths enjoy, because the former generally lack the political power to obtain legislative accommodations for their exercise. S. Rep. No. 111 at 8; H.R. Rep. No. 88 at 6. Witnesses at the House and Senate hearings repeatedly expressed concern that facially neutral, generally applicable laws would be used as vehicles for discrimination against religion and

religious minorities.[3] Indeed, because religious minorities are also frequently racial or ethnic minorities, witnesses advised that "[t]he civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice." *1992 Senate Hearing* 74; see also *id.* at 68-75; *1992 House Hearings* 104, 332-338.

In Congress's judgment, a national response was needed.[4] Congress, accordingly, passed RFRA to establish, as a matter of statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb (b)(1). The compelling interest test, Congress concluded, "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). The Attorneys General of 13 States agreed that RFRA "strikes a proper balance" between the needs of religious claimants and governmental regulation. 139 Cong. Rec. S14,351-S14,352 (Oct. 26, 1993).

c. In passing RFRA, Congress relied upon its authority under Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause, Art. I, § 8, Cl. 18. S. Rep. No. 111 at 13-14; H.R. Rep. No. 88 at 9. Members of Congress disavowed any effort to review or reverse this Court's decision in *Smith* or any other case. S. Rep. No. 111 at 9, 14 n.43; H.R. Rep. No. 88 at 7, 15 n.3; 139 Cong. Rec. H2358 (May 11, 1993) (Rep. Hyde). The House and Senate Reports stated that Congress was creating a new statutory right of free exercise in light of this Court's delineation of the First Amendment's scope.

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[3] See *1992 Senate Hearing* 5-7, 27, 30-39, 63-64, 69-71, 74, 129; *1992 House Hearings* 11, 23-25, 104, 107-108, 157-158, 326, 332-338, 398, 406-408.

[4] See H.R. Rep. No. 88 at 6; see generally *1992 Senate Hearing* 64, 95-96, 129; *1992 House Hearings* 11, 25, 104, 123, 150, 357, 398.

S. Rep. No. 111 at 14 n.43; H.R. Rep. No. 88 at 9, 15 n.3.

2. Factual and procedural history

a. P.F. Flores is the Archbishop of San Antonio, Texas, and Saint Peter Catholic Church in Boerne, Texas, is within his Archdiocese. Due to substantial population growth, the Church cannot accommodate all of the parishioners who seek to attend its services. The Church will be unable to accomplish its mission or continue to serve as a parish church unless it expands. J.A. 5, 10. In 1990, Archbishop Flores authorized enlargement of the Church to accommodate those seeking to worship there and to conform the sanctuary's layout to the current liturgical requirements of the Catholic Church. J.A. 6, 9; Pet. App. 2a.

Six months later, petitioner designated a historic district, the boundaries of which bisected the Church. Although the Church, which was built in 1923, was not designated a historic landmark, its facade fell within the historic district. After the Church's request for a building permit was denied, the Church negotiated with petitioner's architect and submitted revised architectural plans that would preserve the facade, while demolishing other parts of the structure. Petitioner rejected the plans. Six months later, petitioner amended its ordinance to include the entire church structure within the historic district. J.A. 6-9, 68, 70-71; Pet. App. 2a.

b. Archbishop Flores filed suit challenging petitioner's denial of the construction permit and alleging, *inter alia*, that petitioner's action violated RFRA because denial of the permit substantially burdened his exercise of religion and was not justified by a narrowly tailored, compelling interest. J.A. 10-12.[5] Petitioner defended in part on the

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[5] The complaint also includes claims under the First, Fifth, and Fourteenth Amendments to the federal Constitution and under the Texas Constitution. Adjudication of these other claims has been stayed by the district court.

ground that RFRA is unconstitutional. Pet. App. 2a-3a. The United States intervened solely to defend the constitutionality of RFRA. *Id.* at 26a.

The district court ruled that RFRA violates the separation of powers. Pet. App. 24a-29a. The court of appeals reversed. *Id.* at 1a-23a. The court concluded that Congress properly exercised its power under Section 5 of the Fourteenth Amendment to enact RFRA because the Act (i) deters governmental violations of the Free Exercise Clause, (ii) limits the application of laws that have the effect of impeding religious exercise, and (iii) protects and equalizes the free exercise rights of minority religions. *Id.* at 10a-15a. The court of appeals also rejected petitioner's separation of powers, Tenth Amendment, and Establishment Clause challenges. The separation of powers argument, the court concluded, "rests on the mistaken assumption that *Smith* describes not only how little the Government *must* accommodate religion but also how much it *may* accommodate it." *Id.* at 17a. With respect to the Tenth Amendment, the court of appeals ruled that "RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation." *Id.* at 22a. Finally, the court rejected petitioner's facial Establishment Clause challenge because "RFRA no more advances religion than any other legislatively[] mandated accommodation of the exercise of religion." *Id.* at 21a.

SUMMARY OF ARGUMENT

The central issue in this case concerns the scope of Congress's independent legislative role in enforcing the Fourteenth Amendment's most fundamental guarantees. Petitioner does not question the power of federal courts to create prophylactic rules that enforce Fourteenth Amendment guarantees against the States. Petitioner also acknowledges that States may accord additional protection, beyond the constitutional minimum, to fundamental liberties without offending the authority of the federal judiciary or other constitutional principles. It is only

Congress that petitioner would relegate to the constitutional sidelines. The Constitution's text, however, says otherwise. The Fourteenth Amendment expressly invests *Congress* with the authority to enforce its provisions. For more than a century, this Court has agreed that the enforcement provisions of the Civil War Amendments invest Congress—not the courts and not the States—with broad and unique authority to enforce civil rights. Congress has an independent and central role in identifying incipient threats to the exercise of rights guaranteed by the Fourteenth Amendment and in preventing their realization. That is all RFRA does.

I. RFRA represents a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

A. As an initial matter, there is no basis for reconsidering this Court's decision in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Stare decisis counsels strongly against overruling a 30 year-old precedent that is the foundation for the validity of major civil rights legislation. *Morgan*'s holding regarding the scope of congressional power to enforce Fourteenth Amendment guarantees, moreover, comports with Section 5's text and history.

B. When legislating under Section 5, Congress may go beyond simply proscribing conduct that courts would find Section 1 of the Fourteenth Amendment already forbids. Congress may legislate prophylactically and regulate state conduct that creates a risk of constitutional violations and substantially burdens or threatens the exercise of Fourteenth Amendment guarantees. To that end, Congress has the power to safeguard Fourteenth Amendment rights by shielding them with an additional statutory layer of protection. That is what Congress has done here. By erecting a statutory buffer zone around religious exercise, RFRA insulates the core free exercise guarantee against intentional erosion that might otherwise go unremedied, and ensures that minority, unpopular, and emerging faiths enjoy the same freedom as religious adherents who possess the political means to obtain legislative exemptions from

burdensome laws. RFRA, in other words, deters violations of the Free Exercise Clause and promotes equal treatment for all faiths.

II. Petitioner's separation of powers argument proceeds from the mistaken assumption that Congress has supplanted this Court as the final arbiter of the Constitution's requirements. Congress expressly disavowed any attempt independently to interpret the First Amendment. Rather, Congress simply stepped in—as it has done repeatedly in other contexts—and bridged the gap between the tolerance for religion that the First Amendment compels and the protection of religious exercise that Section 5 of the Fourteenth Amendment permits Congress to accord. As such, Congress's prescription of a statutory standard for courts to apply in evaluating a statutory claim for relief transgresses no constitutional boundary between the Legislative and Judicial Branches. True, Congress here chose to enforce the free exercise guarantee by restoring, as a matter of statutory right, a standard of scrutiny that this Court has determined is not constitutionally compelled. But that is not novel. The Voting Rights Act and Title VII of the Civil Rights Act of 1964 do the same thing.

III. Equally unavailing is petitioner's argument that RFRA violates the Establishment Clause. Legislative accommodations that alleviate significant, government-imposed burdens on religious exercise do not violate the Establishment Clause and need not come packaged with equivalent benefits for secular entities. To hold otherwise would condemn numerous state constitutions that also protect religious exercise more than *Smith* does. Indeed, because RFRA protects all religious adherents equally, it averts the potential sectarian discrimination that a piecemeal legislative exemption process risks.

IV. Finally, this Court has repeatedly stressed that federalism concerns have diminished force when Congress acts pursuant to its Fourteenth Amendment power. Under RFRA, petitioner is not obliged to undertake or refrain

from undertaking any particular regulatory activity. RFRA simply requires that, when petitioner's activities substantially burden religious exercise, they will be measured against a reasonable federal standard, specifically calibrated to account for important state interests.

ARGUMENT

Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). Legislation enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment, moreover, "present[s] special concerns for judicial review," because "Congress has considerable latitude * * * when it exercises its 'unique remedial powers' " under that Amendment. *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488-490 (1989) (opinion of O'Connor, J.). The presumption of constitutionality operates with particular force when, as here, Congress specifically considered the constitutionality of its action. H.R. Rep. No. 88 at 9; S. Rep. No. 111 at 14. *Rostker*, 453 U.S. at 64.

I. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 IS A CONSTITUTIONAL EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." That section is a positive grant of legislative power to Congress, beyond the authority embodied in Article I. *Ex parte Virginia*, 100 U.S. 339, 345 (1880); see also *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.).

A. There Is No Basis For Reconsidering *Katzenbach* v. *Morgan*

1. In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), this Court recognized that Section 5 is "a positive grant

of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. In *Morgan,* the Court upheld the statutory ban in the Voting Rights Act of 1965 on the use of literacy tests to prevent persons educated in non-English-speaking (primarily Puerto Rican) schools from voting, 42 U.S.C. 1973b(e), even though a unanimous Supreme Court had previously rejected a facial challenge to the constitutionality of literacy tests. See *Lassiter* v. *Northampton County Bd. of Elections,* 360 U.S. 45 (1959). The Court ruled that Congress's legislative power under Section 5 was not dependent upon a determination by the judiciary that the particular state action subject to the exercise of that power violates Section 1 of the Fourteenth Amendment. *Morgan,* 384 U.S. at 648. To hold otherwise, the Court reasoned, would "depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment" and would confine Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Id.* at 648-649.

The literacy ban constituted "appropriate legislation" within the meaning of Section 5 for two reasons. First, Congress could have determined that Puerto Ricans faced a risk of discrimination in the provision of government services, and that an increase in voting would help combat such discrimination. *Morgan,* 384 U.S. at 652-653. *Morgan* thus held that Section 5 empowers Congress to enact remedial and prophylactic measures that reasonably effectuate and protect against the diminution of constitutional rights. Second, *Morgan* held that Congress could have employed its "specially informed legislative competence" to conclude, as a factual matter, that the specific literacy test at issue did not promote legitimate governmental goals, but instead was a guise for invidious racial discrim-

ination. *Id.* at 653-656. Thus, *Morgan* held that Congress has independent authority to identify and invalidate specific governmental practices when it determines as a factual matter that they violate Section 1 of the Fourteenth Amendment under the standards announced by this Court.

2. Although petitioner asks this Court to "definitively inter[]" *Morgan*'s "substantive power theory" (Pet. Br. 42), it is unclear to which aspect of *Morgan* petitioner objects, because the language from *Morgan* that petitioner attacks (Br. 38) appears only in a footnote that precedes the Court's articulation of both rationales. 384 U.S. at 651 n.10. If petitioner is challenging *Morgan*'s holding that Congress may prohibit a specific state action or law because Congress independently has determined that it actually violates the Fourteenth Amendment, this case presents no occasion to revisit that question. Through RFRA, Congress did not determine that any specific state or local law constituted an invidious discrimination against religion. See H.R. Rep. No. 88 at 7; *id.* at 15 n.3 (additional views); S. Rep. No. 111 at 9, 14 n.43.

If, instead, petitioner challenges *Morgan*'s holding that Congress's enforcement power includes the authority to increase the security of Fourteenth Amendment guarantees by adding a statutory layer of protection beyond the floor set by the Constitution, petitioner's argument should be rejected as inconsistent with Section 5's plain language and legislative history, as well as with principles of stare decisis.

a. Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." At the time of the Fourteenth Amendment's ratification, a common understanding of the term "enforce"—especially in the context of "enforcing a law"—was "to invigorate," "to strengthen," "[t]o give force to," and "[t]o cause to have force and effect." [6] While the amici States correctly note

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[6] 1 N. Webster, *An American Dictionary of the English Language* 447 (1865); A. English, *A Dictionary of Words and*

(Br. 12-13) that the *tenth* definition of "enforce" in the *Oxford English Dictionary* is "[t]o compel, constrain, oblige," the *first* definition is "[t]o put force or strength into," such as "[t]o strengthen (a fortress) by extra works." 3 *Oxford English Dictionary* 171 (1933);[7] see also Cong. Globe, 42d Cong., 2d Sess. 728 (1872) (Sen. Sumner) (noting "the vivacity" of the word "enforce" and "the energy of that expression").

Those definitions comport with ordinary usage of the term "enforce." Members of this Court have frequently characterized judicially created prophylactic rules as "enforcing" constitutional guarantees, even where such rules are not constitutionally compelled. *E.g., Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986) (exclusionary rule); *United States* v. *Payner*, 447 U.S. 727, 733 (1980) (same).[8]

b. The legislative history of the Fourteenth Amendment confirms that Section 5 vests Congress with independent and broad authority to protect against—not just remedy—violations of the Fourteenth Amendment's guarantees.[9] Upon introducing the Fourteenth Amendment in

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Phrases 322 (1899); *Webster's New International Dictionary* 725 (1917).

[7] See also J. Murray, *A New English Dictionary* 171 (Oxford 1897) (same).

[8] See also *Segura* v. *United States*, 468 U.S. 796, 828 n.22 (1984) (Stevens, J., dissenting); *United States* v. *Mandujano*, 425 U.S. 564, 588 (1976) (Brennan, J., concurring in the judgment) (*Miranda* rule). Likewise, enforcement of the laws goes beyond simply arresting criminals after the fact; it includes preemptive measures, such as security x-rays, check points, and roving patrols, which prevent violations from occurring in the first place. Borders are enforced not just by arresting persons after they enter, but also by erecting fences that protect against unlawful intrusions. RFRA is just that—a protective fence around the Fourteenth Amendment's free exercise guarantee.

[9] This Court has previously rejected the argument of amicus Clarendon Foundation (Br. 5-12; States Br. 14-15) that changes in language from the initial draft to the adopted version of the

the Senate, Senator Howard explained that Section 5 was necessary to empower Congress to give "full effect" to the "bill of rights in the Constitution" and to ensure that "these great fundamental guarantees" are "effectuated and enforced, as they assuredly ought to be"; Section 5 was deemed "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); see also *ibid.* (Section 5 "gives [Congress] authority to pass laws which are appropriate to the attainment of the great object of the amendment"); *id.* at 2768 (Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith").[10]

Fourteenth Amendment reflect an intent to narrow the enforcement power. *Morgan*, 384 U.S. at 650 n.9; see also Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham). Indeed, even those who opposed the initial draft on the ground that it conferred too much power in Congress did not understand the language changes to restrict the reach of the enforcement power. See Cong. Globe, 43d Cong., 2d Sess. 979 (1875) (Rep. Hale) (opponent of initial draft characterizes adopted version as containing an "absolute" and "broad" enforcement power authorizing Congress to "legislat[e] in the first instance" and to "select in [its] own discretion all measures appropriate to the end in view").

[10] See also Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland). Debates by the same Congress over the enforcement clause of the Thirteenth Amendment support an equally generous interpretation of congressional power. *Id.* at 1159 (Rep. Windom) (the "broad grant of power" in Section 2 "was made to enable Congress to enforce the spirit as well as the letter of the amendment"), 322 (Sen. Trumbull) (Section 2 empowers Congress "to carry into effect the article prohibiting slavery * * *; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end"), 1124 (Rep. Cook) ("Congress must judge as to what legislation is appropriate and necessary"). The enforcement clause of the Fourteenth Amendment should be construed commensurately with the Thirteenth. See *City of Rome* v. *United States*, 446 U.S. 156, 175-177 (1980); *id.* at 208 n.1 (Rehnquist, J., dissenting) (citing additional cases); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443-444 (1968).

During debate over the Ku Klux Klan Act of 1871, the Fourteenth Amendment's principal drafter, Rep. Bingham, explained that, under that Amendment, Congress can "in advance provide against the denial of rights by States." Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871). "Are not laws preventive," Bingham asked, "as well as remedial and punitive?" *Ibid.*[11] Similarly, while debating the Civil Rights Act of 1875, Senator Carpenter deemed "nonsense" the argument that Congress's parallel power under the Fifteenth Amendment was confined to declaring that no State shall violate the Amendment. "[T]he Constitution declares it already, and no legislation is required for that." Cong. Globe, 43d Cong., 1st Sess. 4085 (1874). Rather, he stated, the enforcement power permits Congress "to carry out the substantial end, to act affirmatively, and to see not only that the State did not do it negatively, but that we might see that the fact itself, the right to vote, should be enjoyed." *Ibid.*

c. The political background against which the Civil War Amendments were adopted readily explains their framers' desire to carve out an independent role for Congress in securing Fourteenth Amendment liberties. Congress, of course, was unwilling to rely upon the States to secure their residents' rights. See, *e.g.*, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) (Schurz Report on the post-war condition of the confederate states). Nor was Congress inclined to leave sole authority for the protection of liberties in the hands of the same federal judiciary

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[11] See also Cong. Globe, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe) ("But if this section [5] is nothing more than a negation, a veto of State acts, where is the room for legislation? * * * Nothing can well be more evident than that, taking the first and fifth sections together, the intention was to enable Congress * * * to secure to citizens the actual enjoyment of the rights and privileges guarantied."). Debates over proposed civil rights legislation in 1872 again stressed the investiture of preventative power in Congress. Cong. Globe, 42d Cong., 2d Sess. 728 (1872) (Sen. Sumner) ("Whatever will fortify [Section 1 rights] is within the power of Congress."), 761 (Sen. Carpenter).

that, less than a decade earlier, had constricted congressional power to contain the spread of slavery. See *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 436-452 (1857); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). Consistent with traditional notions of checks and balances, Congress chose to multiply the institutions capable of protecting federal rights, rather than rely exclusively on any single institution. The Civil War Amendments thus made Congress an independent guarantor of constitutional liberties. As this Court recognized in *Ex parte Virginia*: "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. * * * It is the power of Congress which has been enlarged." 100 U.S. at 345 (emphasis in original). *Morgan* correctly affirmed this.[12]

d. Overruling *Morgan* would be "a matter of no small import, for the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Payne* v. *Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (internal quotation marks omitted). Stare decisis is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)). Petitioner thus must "go beyond mere demonstration that [*Morgan*] was wrong (otherwise the doc-

[12] That the federal courts and States now share in the important task of protecting fundamental rights does not change the fact that the constitutional text at issue here was written to make Congress an independent and proactive force in protecting Fourteenth Amendment liberties. See *United States* v. *Price*, 383 U.S. 787, 801 n.9 (1966) ("It would be strange, indeed, were this Court to revert to a construction of the Fourteenth Amendment which would once again narrow its historical purpose—which remains vital and pertinent to today's problems.").

trine would be no doctrine at all)." *Hubbard* v. *United States*, 115 S. Ct. 1754, 1765 (1995) (Scalia, J., concurring in part and concurring in the judgment); see also *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 864 (1992).

Petitioner, however, has identified no "special justification" for abandoning *Morgan*. *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793, 1801 (1996). Neither petitioner nor its amici contend that *Morgan* is "unworkable" or has caused significant confusion or uncertainty in the law. See *Casey*, 505 U.S. at 854. Nor are there any new facts or legal developments that could justify reconsideration of *Morgan*'s holding that Congress can enhance statutorily the protection accorded Fourteenth Amendment guarantees. See *id.* at 855.

Finally, principles of stare decisis apply with particular force because Congress has relied on *Morgan*'s rationale as the foundation for a panoply of civil rights legislation that has transformed this nation. *Hubbard*, 115 S. Ct. at 1764 (opinion of Stevens, J.); *Casey*, 505 U.S. at 854-855. The Voting Rights Act and its amendments, Title VII, and numerous other provisions of the Civil Rights Acts are premised upon congressional power to enhance statutorily the level of protection afforded Fourteenth Amendment guarantees. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) (reaffirming 42 U.S.C. 1981's prohibition on private racial discrimination); *City of Rome* v. *United States*, 446 U.S. 156 (1980) (upholding preclearance provisions of the Voting Rights Act); *id.* at 215 (Rehnquist, J., dissenting) (Section 5 power is "constitutionally overinclusive"); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding application of Title VII to the States); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding portions of the Voting Rights Act Amendments of 1970); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417-444 (1968) (42 U.S.C.

1982 upheld as constitutional); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (rejecting constitutional challenge to the Voting Rights Act).

B. RFRA Is "Appropriate Legislation" To Enforce The Fourteenth Amendment

Although Congress's power under Section 5 is broad, it is not without limits. This Court has established a three-part test for determining whether legislation enacted pursuant to Congress's Section 5 power is "appropriate." First, the legislation must enforce a right guaranteed by the Fourteenth Amendment. Second, the legislation must be "plainly adapted to that end." Third, the legislation may not transgress any other constitutional limitations. See *Morgan*, 384 U.S. at 651; see also *Rome*, 446 U.S. at 176-178; *Oregon*, 400 U.S. at 124-131 (Black, J.) (Section 5 power may not override express textual reservation of power to the States to regulate voting qualifications for state elections). RFRA satisfies each of those requirements.[13]

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[13] In addition to the court of appeals in this case, virtually every court to address the question has upheld RFRA's constitutionality. *Sasnett* v. *Sullivan*, 91 F.3d 1018 (7th Cir. 1996), petition for cert. pending, No. 96-710; *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 469-470 (D.C. Cir. 1996) (rejecting constitutional authority, separation of powers, and Establishment Clause challenges to RFRA as applied to federal law); *Rouser* v. *White*, Civ. No. S-93-767 LKK/GGH P, 1996 WL 631130 (E.D. Cal. Oct. 28, 1996); *Lindsey* v. *Vaughn*, No. 93-2030 (E.D. Pa. Aug. 15, 1996); *Jews for Jesus, Inc.* v. *Hillsborough County Aviation Auth.*, No. 95-1347 (M.D. Fla. Apr. 8, 1996), slip op. 3, appeal pending, No. 96-2468 (11th Cir.); *Abordo* v. *Hawaii*, 902 F. Supp. 1220, 1229-1234 (D. Haw. 1995); *Muslim* v. *Frame*, 891 F. Supp. 226, 229 n.2 (E.D. Pa. 1995) (dicta); *Belgard* v. *Hawaii*, 883 F. Supp. 510, 512-517 (D. Haw. 1995); *Phipps* v. *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *Campos* v. *Coughlin*, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994) (dicta); *South Jersey Catholic Sch. Teachers Ass'n* v. *St. Teresa of the Infant Jesus Church Elementary Sch.*, 675 A.2d 1155, 1166-1167 (N.J. Super. Ct. App. Div.), certification granted, 683 A.2d 1162 (N.J. 1996) (Table); *State* v. *Miller*, 538 N.W.2d 573, 576-

1. *RFRA Enforces Both The Due Process And Equal Protection Clauses Of The Fourteenth Amendment*

a. The right to free exercise of religion guaranteed by the First Amendment is a component of the "liberty" protected by the Fourteenth Amendment against state infringement. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). Accordingly, the Fourteenth Amendment's Due Process Clause "impose[s] the same substantive limitations on the States' power to legislate that the First

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577 (Wis. Ct. App. 1995), aff'd, 549 N.W.2d 235 (Wis. 1996); see also *United States* v. *Bauer*, 84 F.3d 1549, 1558 (9th Cir.) (RFRA case acknowledging Congress's power and prior practice of protecting "the great guarantees of the Bill of Rights," including First Amendment rights), cert. denied, 117 S. Ct. 267 (1996); *In re Young (Christians v. Crystal Evangelical Free Church)*, 82 F.3d 1407, 1417 (8th Cir. 1996) ("This circuit * * * has at least implicitly held that the RFRA is constitutional."), petition for cert. pending, No. 96-437; see generally D. Ackerman, *The Religious Freedom Restoration Act of 1993: A Legal Analysis*, Congressional Research Service, at 34-35 (Apr. 23, 1993); M. Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029, 1061 (1993); B. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996); D. Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145 (1995); D. Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 245-254. But see *In re Hodge*, 200 B.R. 884, 899-902 (Bankr. D. Idaho 1996); *Keeler* v. *Mayor & City Council of Cumberland*, 928 F. Supp. 591, 595-604 (D. Md. 1996); *In re Tessier*, 190 B.R. 396, 405-407 (Bankr. D. Mont. 1995), appeal dismissed as moot, No. MT-95-2336 (9th Cir. Bankr. App. Panel May 7, 1996), appeal pending, No. 96-35801 (9th Cir.); *Hamilton* v. *Schriro*, 74 F.3d 1545, 1559-1570 (8th Cir. 1996) (McMillian, J., dissenting); *Smith* v. *Fair Employment & Housing Comm'n*, 913 P.2d 909, 937-939 (Cal. 1996) (Mosk, J., concurring) (finding RFRA unconstitutional in case where issue was neither briefed nor argued), petition for cert. pending, No. 96-31.

Amendment had always imposed on the Congress's power." *Wallace* v. *Jaffree*, 472 U.S. 38, 49 (1985).[14]

Congress's express purpose in enacting RFRA was to protect and enforce this free exercise guarantee. 42 U.S.C. 2000bb(b); S. Rep. No. 111 at 14 n.43; see also *Swanner* v. *Anchorage Equal Rights Comm'n*, 115 S. Ct. 460, 462 (1994) (Thomas, J., dissenting from denial of certiorari). Congress found that existing law and governmental practices threatened unduly to obstruct or impede the free exercise of religion. 42 U.S.C. 2000bb(a).[15] Congress also expressed concern that facially neutral laws could be used to target minority or unpopular religions, and that such constitutional violations might escape detection under *Smith*. H.R. Rep. No. 88 at 6; see *1992 Senate Hearing* 68-71.

b. Unlike petitioner (Br. 41 n.11), this Court "ha[s] no doubt of the power of Congress to enforce * * *

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[14] Because RFRA enforces a fundamental Fourteenth Amendment guarantee, this case presents no occasion to decide the scope of Congress's Section 5 power beyond those fundamental guarantees or suspect classes that merit heightened protection under the Amendment. Compare *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring in part and concurring in the judgment) (Constitution accords "special protection to the exercise of religion"); *Smith*, 494 U.S. at 895 (O'Connor, J., concurring in the judgment) (religious liberty "occupies a preferred position"); and *Wallace*, 472 U.S. at 50 n.35, 53 n.37 (same), with *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16 n.12 (1981) (questioning congressional power to enforce a right to treatment in the least restrictive setting); *Oregon*, *supra* (Congress lacks authority to reduce voting age in state elections from 21 to 18); and *United States* v. *Reese*, 92 U.S. 214, 217-222 (1875) (Fifteenth Amendment legislation must be connected with discrimination on the basis of "race, color, or previous condition of servitude").

[15] See also S. Rep. No. 111 at 4-5, 8 (Congress finds "a climate in which the free exercise of religion is jeopardized"); H.R. Rep. No. 88 at 5 (Congress finds "a climate in which the free exercise of religion is continually in jeopardy"); 139 Cong. Rec. H2361 (May 11, 1993) (Rep. Hoyer) ("churches have no more constitutional rights than adult movie theaters").

every right guaranteed by the Due Process Clause of the Fourteenth Amendment." *United States* v. *Price*, 383 U.S. 787, 789 (1966) (internal quotation marks omitted).[16] Nor is there any basis for concluding that Congress's enforcement powers are diminished when it enforces rights guaranteed by the Due Process Clause rather than the Equal Protection Clause. Section 5's plain text admits of no such distinction. "The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it." Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham); see also *Oregon*, 400 U.S. at 143-144 (Douglas, J.) ("Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone.").

Section 5's legislative history confirms that the enforcement power extends to rights incorporated in the Due Process Clause. When Senator Howard introduced the Fourteenth Amendment on the Senate floor, he expressly referred to Congress's ability to enforce and "carry out all the principles of all these guarantees," which include "the personal rights guarantied and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2765, 2766 (1866); see also Cong.

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[16] See also 42 U.S.C. 1983, 1988, 2000aa; 18 U.S.C. 241, 242, 247; *Maher* v. *Gagne*, 448 U.S. 122, 130-133 (1980) (remedying statutory violation brought in conjunction with due process and equal protection claims); *Hutto* v. *Finney*, 437 U.S. 678, 693-695 (1978) (enforcing Eighth Amendment through award of attorneys' fees); *Oregon*, 400 U.S. at 147-150 (Douglas, J.) (ban on residency requirements falls within Section 5 power), 236-239 (Brennan, White & Marshall, JJ.) (Section 5 power can enforce right to travel between States), 285-287 (Stewart, J., joined by Burger, C.J., & Blackmun, J.) (same); J. Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 20 (1992) ("[T]he Liberty Clause[] in the Fourteenth Amendment has transformed the Bill of Rights from a mere constraint on federal power into a source of federal authority to constrain state power.")

Globe, 42d Cong., 1st Sess. App. 84 (1871) (after reading the first eight Amendments into the record verbatim, Rep. Bingham explains that "[t]hese eight articles * * * never were limitations upon the power of the States, until made so by the fourteenth amendment," and that they "may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make").[17] Thus, if petitioner wishes to rewrite Section 5 to limit it to "the provisions of this article pertaining to equal protection," its proper recourse is through a constitutional amendment.

The protection of religious exercise against state action, moreover, was a specific concern of Congress at the time the Fourteenth Amendment was enacted. The South's suppression of African-based slave religions and persecution of church-based abolitionist movements through the use of general laws were frequently discussed by supporters of the Fourteenth Amendment.[18] The Schurz Report,

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[17] See also Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (Sen. Howard) (Section 5 "gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment" and charges Congress with ensuring "that all the sections of the amendment are carried out"); Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871) (Rep. Bingham) (Section 5 confers power "to enforce this [equal protection clause] and every other provision of this article"), 69 (Rep. Shellabarger).

[18] See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson) (noting the South's "bitter, cruel, relentless persecutions of the Methodists"); Cong. Globe, 38th Cong., 2d Sess. 138 (1865) (Rep. Ashley) (the South "has silenced every free pulpit within its control, and debauched thousands which ought to have been independent"); Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull) (decrying law that criminalized "exercising the functions of a minister of the Gospel [by] free negroes"); Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871) (Rep. Bingham) ("[The States] restricted the rights of conscience, and he had no remedy. * * * Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these * * *?"), 84 (Fourteenth Amendment will prevent laws that penalize "teaching the Indian to read the lessons

which Congress ordered to document conditions in the former confederate states after the war, noted a number of instances of religious persecution, including some through the use of facially neutral laws. S. Exec. Doc. No. 2 at 81 (Southerners have invoked noise regulations to "suppress the religious meetings among the colored people"), 85 (planters propose regulations authorizing only ordained ministers to preach and imposing a 10:00 p.m. curfew on meetings, in order to suppress worship services of freed slaves), 100 ("[T]here is such a general expression of contempt for negro religion, and such a desire to suppress it, if possible, that it seems as if the whites thought it a piece of terrible impertinence for the blacks to worship the same God that we do.").[19] In seeking to end such practices, Congress was not exclusively motivated by its general concern abut racial discrimination; Congress had an independent desire to assure the free exercise of religion for all citizens, including Nor-

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of the New Testament"), 310 (Rep. Maynard) (rights secured by the Fourteenth Amendment include freedom of religion); Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (Rep. Beatty) (citing the "sworn testimony of ministers of the Gospel who have been scourged because of their political opinions"); Cong. Globe, 42d Cong., 2d Sess. 759 (1872) (Sen. Carpenter), 847-848 (Sen. Frelinghuysen), 898 (Sen. Morton); see also *1992 House Hearings* 332; K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

[19] See also S. Exec. Doc. No. 2 at 26 (citing instances of burning of "churches in which colored people assembled to worship," threats of assassination against "colored preachers," and murders of Northern preachers), 58 (same), 69 ("[O]ne man was taken out of bed and killed because * * * he was a preacher."), 72 ("[T]heir humble worship of God is construed as a designing plot to rise against the citizens who oppress them."), 82 (freed slaves need "the free exercise of their right to worship God"), 93 (zoning Negro churches out of town and requiring special permits for Negro preachers), 94 (same, limiting Negroes to attendance at services conducted by white ministers), 95 (same).

therners who had migrated to the South (such as abolitionists) and Union loyalists.[20]

This Court, moreover, has previously upheld exercises of Congress's enforcement power outside of the Equal Protection Clause. In *Oregon* v. *Mitchell*, this Court upheld Congress's ban on durational residency requirements for voting, 42 U.S.C. 1973aa-1(a)(5), which was expressly designed to enforce the Due Process Clause. And this Court did so without separately deciding that the residency requirement was unconstitutional. 400 U.S. at 285-287 (Stewart, J., joined by Burger, C.J., & Blackmun, J.), 236-239 (Brennan, White & Marshall, JJ.), 147-150 (Douglas, J.). In fact, a year earlier, the Court had upheld a similar residency requirement against constitutional challenge. *Drueding* v. *Devlin*, 380 U.S. 125 (1965) (mem.); see also *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965). Similarly, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court upheld Congress's authority under Section 5 to provide for attorney's fees to enforce the Eighth Amendment, without first finding that the State's punitive isolation policy violated the Eighth Amendment. *Id.* at 687-688; see also *id.* at 710 (Rehnquist, J., dissenting).

Indeed, there is great irony to petitioner's and its amici's argument that Congress cannot enforce the guarantees of the Due Process Clause. This Court has promulgated a number of prophylactic rules designed to enforce Fourteenth Amendment guarantees against the States. See *Michigan* v. *Jackson*, 475 U.S. 625, 632-636 (1986) (protection of Sixth Amendment right to counsel); *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969) (procedures to protect against vindictiveness in sentencing after second trial); *Anders* v. *California*, 386 U.S. 738

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[20] See S. Exec. Doc. No. 2 at 26, 63, 77, 83-84, 91, 100, 103; A. Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 Ariz. L. Rev. 236 (1967) (cataloguing legislative history); cf. *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 683, 685 & n.45 (1978).

(1967) (appellate duties of counsel for indigent criminal defendants); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusionary rule); cf. *Gooding* v. *Wilson*, 405 U.S. 518, 520-521 (1972) (overbreadth doctrine).[21] States, likewise, enjoy the authority to accord individuals greater civil liberties and protections than the federal Constitution compels. *Greene* v. *Georgia*, No. 96-5369 (Dec. 16, 1996), slip op. 2 (per curiam) (to be reported at 117 S. Ct. 578); *Smith*, 494 U.S. at 890; *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 81 (1980). Under petitioner's proposed construction of Section 5, then, the only institution incapable of prophylactically protecting the Fourteenth Amendment's guarantees is Congress—the very entity that the Amendment's text expressly designates to enforce its provisions. Cf. *Croson*, 488 U.S. at 488 (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation, emphasis omitted); *Ex parte Virginia*, 100 U.S. at 345 ("It is the power of Congress which has been enlarged."); see also *Missouri* v. *Jenkins*, 115 S. Ct. 2038, 2061 (1995) (O'Connor, J., concurring) (Congress has an independent role in determining "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

c. RFRA also enforces the Fourteenth Amendment's Equal Protection Clause by protecting against religious discrimination, whether veiled behind generally applicable

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[21] See also *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 (1991) (*Miranda* "established a number of prophylactic rights"); *Michigan* v. *Harvey*, 494 U.S. 344, 345 (1990) (*Jackson* "established a prophylactic rule"); *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987) ("*Anders* established a prophylactic framework"); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976) (exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect") (citation omitted); *Michigan* v. *Payne*, 412 U.S. 47, 51 (1973) (characterizing *Pearce*'s limitations as prophylactic measures).

laws or resulting from disparate legislative accommodations, that might otherwise go undetected. Like race, gender, and ethnicity, religious affiliation is among the suspect classifications traditionally protected by the Equal Protection Clause. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); see also *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct. 2481, 2504 (1994) (Kennedy, J., concurring in the judgment). RFRA's legislative history amply documents its equal protection component and, in particular, congressional concern that, in light of *Smith*, courts will be unable to provide sufficient protection against religious discrimination and the inequitable treatment of religious minorities. See S. Rep. No. 111 at 8; H.R. Rep. No. 88 at 6.[22]

Furthermore, because religious minorities are also frequently racial or ethnic minorities (such as Cubans, Native Americans, Arabs, Asians), preventing religious discrimination promotes the historic goal of eliminating racial and ethnic discrimination. Indeed, because of the overlap between racial or ethnic minorities and religious minorities, Congress could reasonably conclude that "[t]he civil rights laws are to little avail unless they provide for religious liberty as well as for racial and ethnic justice." *1992 Senate Hearing* 74; see also *id.* at 68-75; *1992 House Hearings* 104, 332-338; cf. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 616-618 (1987) (desecration of Jewish synagogue may be basis for racial discrimination suit under 42 U.S.C. 1982).[23]

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[22] See also *1992 Senate Hearing* 5-7, 27, 30-39, 63-64, 69-71, 74, 129; *1992 House Hearings* 11, 23-25, 104, 107-108, 157-158, 326, 332-338, 398, 406-408.

[23] See also H.R. Rep. No. 621, 104th Cong., 2d Sess. 4 (1996) (Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392, will "make it easier to punish those whose racial, ethnic or religious animus lead[s] them to destroy religious property").

2. *RFRA Is Plainly Adapted To Enforcing The Fourteenth Amendment's Free Exercise Guarantee And The Equal Protection Clause*

Like Congress's broad authority under the Necessary and Proper Clause, congressional authority under Section 5 encompasses all legislation reasonably designed to enforce the guarantees of the Fourteenth Amendment:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. at 345-346.[24] Legislation enacted pursuant to Congress's Section 5 authority is valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of that power." *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Congress's determination that RFRA is necessary to enforce the Fourteenth Amendment is thus reviewed for reasonableness. *Fullilove* v. *Klutznick*, 448 U.S. 448, 477 (1980) (opinion of Burger, C.J.); *Jones*, 392 U.S. at 440-444.[25] Because RFRA (i) prophylacti-

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[24] See also *Rome*, 446 U.S. at 175; *Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); cf. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

[25] Petitioner's argument that Congress did not compile sufficient factual findings is wrong as a matter of both law and fact. First, "Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding." *Fullilove*, 448 U.S. at 502 (Powell, J., concurring); see also *United States* v. *Lopez*, 115 S. Ct. 1624, 1631 (1995) ("Congress need [not] make particularized findings in order to legislate.") (citation omitted). Second, Congress did

cally deters governmental action that would violate the Free Exercise Clause, (ii) equalizes the protection afforded all religions and, in particular, minority faiths, and (iii) protects against governmental encroachment that has the effect of impeding religious exercise, RFRA is "plainly adapted" to enforcing the Fourteenth Amendment's free exercise and equal protection guarantees.[26]

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compile an extensive record of hearing testimony, committee reports, and congressional debates in the course of enacting RFRA. See pp. 3-5, *supra*. That record far surpasses what Congress compiled in the course of enacting other Section 5 legislation. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986); *Fullilove*, 448 U.S. at 458-462 (opinion of Burger, C.J.); *Oregon*, 400 U.S. at 216 (Harlan, J.); *Morgan*, 384 U.S. at 669 & n.9 (Harlan, J., dissenting) (literacy test ban added to statute on the floor of Congress). Likewise, petitioner's argument that there was insufficient evidence of a risk of unconstitutional conduct by States is wrong as a factual matter, see pp. 26-35, and misunderstands the law. See *Oregon*, 400 U.S. at 133-134 (Black, J.), 147 (Douglas, J.), 216-217 (Harlan, J.), 233-236 (Brennan, White & Marshall, JJ.), 283-284 (Stewart, J., joined by Burger, C.J., & Blackmun, J.) (nationwide ban on literacy tests upheld despite geographically limited evidence of abuse); *Rome*, 446 U.S. at 172 (application of voting preclearance requirements upheld even though no discriminatory purpose underlay adoption of city's electoral system); see also *id.* at 190 (Stevens, J., concurring) ("that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant"). Indeed, Congress extended Title VII's ban on gender discrimination, which included protection against employment practices with a disparate impact, to the States in 1972—a full year before this Court first expressly held that the Equal Protection Clause imposes heightened scrutiny on gender discrimination. See *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Fitzpatrick*, 427 U.S. at 451-457.

[26] Indeed, the reasonableness of Congress's selection of RFRA to enforce the free exercise and equal protection guarantees is evidenced by the fact that (i) for 30 years this Court and the lower courts applied the same test to enforce the Free Exercise Clause, and (ii) numerous States employ the same test to protect religious exercise under their own constitutions and laws. See *State* v. *Miller*, 549 N.W.2d 235, 241 (Wis. 1996); *Swanner* v.

a. *RFRA deters governmental violations of the free exercise guarantee*

Legislation that regulates "some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" violates the First and Fourteenth Amendments. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). By limiting government's ability to apply general laws to individual religious exercise, RFRA establishes a bulwark against the deliberate handicapping of religion by government.

Congress heard extensive testimony documenting the risk that facially neutral laws can be used as a guise for intentional religious discrimination. See, *e.g.*, H.R. Rep. No. 88 at 2 ("facially neutral laws of general applicability have nefariously burdened the free exercise of religion in the United States throughout American history") (citing testimony); S. Rep. No. 111 at 4-5 & nn.2-3 (citing *Lukumi* and testimony regarding abusive uses of laws).[27] Contemporary case law corroborates this con-

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Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-281 (Alaska), cert. denied, 115 S. Ct. 460 (1994); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994); *Hunt* v. *Hunt*, 648 A.2d 843, 853 (Vt. 1994); *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 185-187 (Wash. 1992); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-66 (Me. 1992) (applying compelling interest test to analyze claim under state constitution); *St. John's Lutheran Church* v. *State Compensation Ins. Fund*, 830 P.2d 1271, 1276 (Mont. 1992) (applying compelling interest test without discussing *Smith*); *State* v. *Hershberger*, 462 N.W.2d 393, 396-398 (Minn. 1990); *State* v. *Evans*, 796 P.2d 178, 180 (Kan. Ct. App. 1990) (applying compelling interest test without discussing *Smith*); *In re Brown*, 478 So. 2d 1033, 1039 & n.5 (Miss. 1985); *Porth* v. *Roman Catholic Diocese*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995); R.I. Gen. Laws § 42-80.1-3(b) (1993); cf. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (state constitutional protection of religion is "substantially stronger" than federal constitutional protection), cert. denied, 424 U.S. 954 (1976).

[27] *1992 Senate Hearing* 68-71 (discussing how "neutral" laws can be and have been historically used in this country as instru-

cern.[28] By subjecting governmental rules that substantially burden religious exercise to heightened scrutiny, RFRA protects against those "subtle departures from neutrality" that the First Amendment condemns. Compare *Lukumi*, 508 U.S. at 534, with *Smith*, 494 U.S. at 889 (lower court decision in *Lukumi* cited as example of generally applicable law).

RFRA, moreover, relieves plaintiffs of having to undertake the difficult task of proving legislative bias or the improper targeting of religion in order to vindicate their free exercise rights. H.R. Rep. No. 88 at 6 (noting difficulty of uncovering improper legislative motive when reviewing facially neutral law); *1992 Senate Hearing* 69-71; 139 Cong. Rec. H2361 (May 11, 1993) (Rep. Orton); *id.* at H2357 (Rep. Edwards). This Court has upheld Section 5 legislation designed to eliminate such heavy burdens of proof.[29]

b. *RFRA protects the free exercise and equal protection rights of minority religions*

RFRA not only protects against governmental action that impermissibly targets religious exercise; it also pro-

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ments of religious persecution, citing as examples laws used to suppress Catholics, Mormons, and Jehovah's Witnesses).

[28] See, *e.g.*, *Lukumi*, 508 U.S. at 533-542; *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995) (zoning), cert. denied, 116 S. Ct. 2546 (1996); *Islamic Ctr. of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) (zoning); see also *Brown* v. *Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994); *Abierta* v. *City of Chicago*, No. 96 C 3487, 1996 WL 714538 (N.D. Ill. Dec. 6, 1996) (zoning); *Rader* v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996); see also *Church of Jesus Christ of Latter-Day Saints* v. *Jefferson County*, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990); *Congregation Comm., Jehovah's Witnesses* v. *City Council of Haltom City*, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956).

[29] See *Rome*, 446 U.S. at 174; *South Carolina* v. *Katzenbach*, 383 U.S. at 328; see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (summarily affirming constitutionality of Voting Rights Act Amendments of 1982); *Fitzpatrick*, 427 U.S. at 451-456 (Title VII).

phylactically deters discrimination against religious adherents, and, in particular, members of minority faiths. Witnesses before Congress testified that facially neutral, generally applicable laws are often used as vehicles for discrimination against minority religious groups. See *1992 Senate Hearing* 69-71 (surveying historic treatment of religious minorities under neutral laws and persecution it has inspired).[30] In light of that record, Congress could reasonably conclude that, to protect minority faiths, more exacting scrutiny is needed of laws that burden religious practice. Requiring that government act in such a particularized and careful manner is an appropriate exercise of congressional power. See *EEOC* v. *Wyoming*, 460 U.S. at 239 (requiring States "to achieve [their] goals in a more individualized and careful manner"); *Morgan*, 384 U.S. at 655 n.15 ("States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened.").

RFRA further enforces the Fourteenth Amendment's free exercise and equal protection guarantees by ensuring that religious minorities will not be disproportionately subjected to burdens on their exercise of religion. Because minority religions often lack the political power to obtain accommodations, Congress concluded that legislation was needed to preserve for them the same religious freedom enjoyed by more established faiths. S. Rep. No. 111 at 8; H.R. Rep. No. 88 at 6. The legislative history reveals widespread concern that *Smith* would dispropor-

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[30] See also *1992 Senate Hearing* 5-7, 27 (Hmongs), 30-39 (Mormons), 63-64; *1992 House Hearings* 11, 23-25 (Mormons), 104 ("It is the minority religions, the unpopular religions, the new religions that are going to be discriminated against."), 107-108, 157-158 (Jews, Amish, Muslims), 326 (legislative exemption process "will turn out to be discriminatory"), 332-338 (historic use of neutral laws to "fan[] the flames of persecution" and contemporary examples of *Smith*'s harsh application to Jehovah's Witnesses, Jews, Mormons), 398, 406-408 (Quakers and Native Americans).

tionately impact religious minorities. See *1992 Senate Hearing* 74 (after *Smith*, "there is a widespread impression that religious minorities simply have no constitutional rights any more"); *1992 House Hearings* 326 (without RFRA, legislative exemption process will not operate in an evenhanded manner).[31] Indeed, in *Smith* this Court acknowledged that its rule "will place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. RFRA prevents that inequity from materializing, and thus accomplishes that "perfect equality of civil rights and the equal protection of the laws" that lies at the heart of Congress's Section 5 power. *Ex parte Virginia*, 100 U.S. at 345-346; see also *Lukumi*, 508 U.S. at 561-562 (Souter, J., concurring) (strict scrutiny of governmental action that substantially burdens religion promotes "substantive neutrality").[32]

In short, Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 488 U.S. at

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[31] See also *1992 Senate Hearing* 5-7, 27 (Hmongs' exercise of animism), 30-39 (Mormons), 63-64, 69-71, 129; *1992 House Hearings* 11, 23-25 (Mormons), 104, 107-108 (Hmongs), 150, 157-158 (impact of *Smith* on Jews, Amish, Muslims), 332-338, 398, 406-408 (Quakers and Native Americans); *Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 28 (1990) (*1990 House Hearing*); 139 Cong. Rec. H2361-H2362 (May 11, 1993).

[32] By proscribing governmental action with a discriminatory impact, RFRA parallels Title VII and the 1982 amendments to the Voting Rights Act. See *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Griggs*, 401 U.S. at 431, 432 (Title VII bars employment practices that are "discriminatory in operation" and act as "'built-in headwinds' for minority groups"); see also *Bush* v. *Vera*, 116 S. Ct. 1941, 1969 (1996) (O'Connor, J., concurring) ("The results test of § 2 [of the Voting Rights Act] is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment" to equality in voting.).

490 (opinion of O'Connor, J.) (emphasis in original). The legislative record compiled by Congress amply documents the concern that: (i) religious groups have, in the past, been subjected to persecution through general laws; (ii) discrimination on the basis of religion continues to this day; (iii) such discrimination can and often has occurred through the guise of facially neutral laws; (iv) the difficulty of proving that a legislature was biased against or otherwise targeted religion frequently poses an insurmountable barrier to the vindication of free exercise and equal protection rights; and (v) even well-intentioned legislatures may not adequately protect religious minorities. Congress thus reasonably concluded that the prophylactic imposition of a limited accommodation requirement is necessary to protect against religious discrimination and to guarantee equal opportunity for religious exercise. That is precisely what Section 5 empowers Congress to do.[33]

c. *RFRA deters governmental action that has the effect of impeding religious exercise*

Even when the Constitution prohibits only governmental action that intentionally interferes with Fourteenth

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[33] RFRA is similar in this respect to Congress's enactment of Title VII, which, in addition to proscribing race and sex discrimination, forbids discrimination on the basis of religion. 42 U.S.C. 2000e-2(a). In bringing religion within Title VII's shield, "Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices." *Ansonia*, 479 U.S. at 70. To that end, Title VII imposes an affirmative obligation on States as employers to accommodate religious exercise, unless to do so would result in "undue hardship." 42 U.S.C. 2000e(j); see also *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71-75 (1977). This Court has upheld the application of Title VII to the States as an exercise of the Section 5 power. *Fitzpatrick*, 427 U.S. at 453-456 & n.9 (gender discrimination); see also *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (requiring reasonable accommodation of religious practitioners is a proper component of an anti-discrimination law).

Amendment rights, Section 5 permits Congress to go further and prohibit conduct that has the effect of substantially burdening and impeding the exercise of those liberties. *Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.); *Rome*, 446 U.S. at 177 (Congress may prohibit state conduct with discriminatory effects that "create[s] the risk" that constitutional rights will be infringed); see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986).

Even absent the intentional targeting of religion, laws of general applicability can have the effect of interfering with and deterring the free exercise of religion. See, *e.g.*, *Smith*, 494 U.S. at 901 (O'Connor, J., concurring in the judgment) ("There is nothing talismanic about neutral laws of general applicability[.] * * * [They] can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.").[34] RFRA's legislative history is replete with evidence that the government's failure to accommodate religious practices under neutral laws can strike at the core of religion and an individual's ability to adhere to tenets of the faith.[35]

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[34] See also *Thomas* v. *Review Bd.*, 450 U.S. 707, 717-718 (1981); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (general rule "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship").

[35] See S. Rep. No. 111 at 4-5, 8 & n.13 (*Smith* "has created a climate in which the free exercise of religion is jeopardized," noting as examples autopsies performed on Jews despite deep religious objections); H.R. Rep. No. 88 at 6 n.14 (autopsy performed on member of Hmong religion violated strongly held religious convictions of family); *1992 Senate Hearing* 5-6, 63 (deleterious impact of general, neutral laws, such as autopsy requirement and education rules, on Hmongs, Catholics, Mormons, and Jehovah's Witnesses); *1992 House Hearings* 17-18, 24-25, 123, 408 (neutral laws governing vehicular traffic, school students, and employment impede religious practices of Amish, Jehovah's Witnesses, Catholics, Mormons, and Native Americans); 139 Cong. Rec. E1234 (May 12, 1993) (Rep. Cardin) ("Veterans have been denied the right to be buried in some veterans' cemeteries on Saturday and Sunday even if their religious beliefs required it.").

Congress determined that "[i]t is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute." H.R. Rep. No. 88 at 6; accord S. Rep. No. 111 at 8 ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths.").[36] Evidence before Congress, moreover, affirmed the need for a uniform, national response to this problem.[37]

Thus, just as this Court has done in other instances, Congress determined that a Fourteenth Amendment liberty "need[s] breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965). *Smith* did not alter the status of the free exercise guarantee as a fundamental liberty secured by the Fourteenth Amendment; it simply changed the point at which government must yield to that interest. See *Smith*, 494 U.S. at 886 n.3. RFRA, like the Voting Rights Act and Title VII, moves that point back by focusing on effect rather than intent. Compare *Washington* v. *Davis*, 426 U.S. 229 (1976), and *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), with *Connecticut* v. *Teal*, 457 U.S. 440 (1982), and *Rome*, 446 U.S. at 173-178. This is an appropriate means of enforcing the Fourteenth Amendment's free exercise guarantee. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment) ("[G]overnment pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion.").

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[36] See also *1992 Senate Hearing* 64, 95-96, 129; *1992 House Hearings* 11, 25, 104, 123, 150, 357, 398.

[37] *1990 House Hearing* 78 ("Because of the size and diversity of the national polity, Congress can provide more reliable majoritarian protection for individual rights than the states can provide."); cf. *Croson*, 488 U.S. at 522-523 (Scalia, J., concurring in the judgment) (noting greater risk of discrimination at local and state level than federal level); The Federalist No. 10 (J. Madison).

In sum, the legislative judgments underlying RFRA reflect Congress's unique capacity to evaluate the problems surrounding religious exercise from a national perspective, place them in historical context, and determine facts and weigh competing policy considerations. Because Congress bears primary responsibility for enforcing the Fourteenth Amendment, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U.S. 63, 67 (1965).

3. *RFRA Infringes No Other Constitutional Rights*

As discussed below, RFRA does not transgress or diminish other constitutional rights. Thus, each prong of the *Morgan* test is satisfied.[38]

II. RFRA FULLY COMPORTS WITH THE SEPARATION OF POWERS

As an appropriate exercise of Congress's authority under Section 5 of the Fourteenth Amendment to enhance statutorily the protection afforded constitutional guarantees, RFRA does not unconstitutionally erode the independence of the judiciary. The separation of powers

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[38] In addition to being an appropriate exercise of Congress's Section 5 power, RFRA is a constitutionally proper exercise of Congress's Article I, Section 8, power to the extent that RFRA regulates federal law (*EEOC* v. *Catholic Univ.*, 83 F.3d at 469-470), applies to the States as a condition on a spending program enacted under Congress's spending power, or reflects an as-applied exercise of the Commerce Clause power. See S. Rep. No. 111 at 13-14; H.R. Rep. No. 88 at 9; Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73, 90 n.79. RFRA is also constitutional in all those cases where its protections duplicate those provided by the federal Constitution. See *Smith*, 494 U.S. at 881-885. Finally, RFRA applies to the amici Territories of American Samoa, Guam, and the Virgin Islands, through Congress's plenary power under Article IV, Section 3, Clause 2. *National Bank* v. *County of Yankton*, 101 U.S. 129, 132-133 (1880).

doctrine precludes the Executive and Legislative Branches from reviewing and revising specific judgments of the federal courts, and assigns to this Court authority to interpret the Constitution in furtherance of resolving cases and controversies within its jurisdiction. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803); see also *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995). RFRA transgresses none of those bounds.

A. RFRA Creates A Distinct Statutory Right

Nothing in RFRA permits Congress or the Executive to review specific decisions of federal courts. Nor did Congress purport to overturn this Court's constitutional holdings. To the contrary, Congress repeatedly disavowed any effort to review or reverse this Court's decision in *Smith* or any other case:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion.

S. Rep. No. 111 at 14 n.43.[39] Thus, as numerous courts have recognized, RFRA does not purport to alter the scope of the First Amendment or create new constitu-

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[39] See also H.R. Rep. No. 88 at 15 n.3 ("Of course, the label 'restoration' in this context is inappropriate. Congress writes laws —it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment.") (additional views); *id.* at 7 ("[T]he Committee neither approves nor disapproves of the result in any particular court decision * * *. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions."); 139 Cong. Rec. H2358 (May 11, 1993) (Rep. Hyde); 137 Cong. Rec. E2422 (June 27, 1991) (Rep. Solarz).

tional rights; rather, RFRA creates a distinct statutory right by increasing the protection accorded an established Fourteenth Amendment guarantee.[40] Further, RFRA does not affect the authority or duty of the courts to say what the Constitution requires. It simply adds an additional statutory requirement for the courts to interpret and apply.

B. The Separation Of Powers Doctrine Permits Congress To Enact Statutes Reimposing Standards Of Scrutiny That Are Not Constitutionally Compelled

Legislative enactments that, like RFRA, respond to decisions of this Court by creating enhanced statutory rights are commonplace and consistent with the separation of powers doctrine. In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), for example, a plurality of the Court held that a voting practice's discriminatory effect, standing alone, does not violate the Fourteenth Amendment. *Id.* at 65-80 (opinion of Stewart, J.). In response to *Bolden*'s delineation of the scope of the Equal Protection Clause, Congress amended the Voting Rights Act to "make clear that a violation could be proved by showing discriminatory effect alone" and expressly reestablished as a matter of statutory law the legal standard employed by this Court in earlier equal protection cases, such as *White* v. *Regester*, 412 U.S. 755 (1973). See *Gingles*, 478 U.S. at 35; see also S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (legislation meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard"); *Morse* v. *Republican Party*, 116 S. Ct. 1186, 1205 n.30 (1996) (opinion of Stevens, J., joined by Ginsburg, J.). Acknowl-

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[40] See *Sasnett*, 91 F.3d at 1020; *Bauer*, 84 F.3d at 1558; *EEOC* v. *Catholic Univ.*, 83 F.3d at 469; *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995), cert. denied, 116 S. Ct. 706 (1996); *Werner* v. *McCotter*, 49 F.3d 1476, 1479 (10th Cir.), cert. denied, 115 S. Ct. 2625 (1995); see also *Swanner*, 115 S. Ct. at 460 n.1 (Thomas, J., dissenting from denial of certiorari).

edging that Congress's action "was largely a response to this Court's plurality opinion in [*Bolden*]," the Court has enforced the statutory right for nearly 15 years without voicing any separation of powers concerns. *Gingles*, 478 U.S. at 35; see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.); *Bush* v. *Vera*, 116 S. Ct. 1941, 1968 (1996) (O'Connor, J., concurring) (noting unanimity of lower court decisions sustaining the Act). Like RFRA, the post-*Bolden* voting rights legislation

> does not purport to usurp the judicial role of defining the substantive scope of the fourteenth amendment or the fifteenth amendment. Instead, Congress seeks to protect the core values of these amendments through a remedial scheme that invalidates election systems that, although constitutionally permissible, might debase the amendments' guarantees.

Jones v. *City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984).

Likewise, in *Washington* v. *Davis*, this Court held that only intentional discrimination in public employment violates the Equal Protection Clause. 426 U.S. at 238-248. Congress has nevertheless imposed upon employers, through Title VII, the discriminatory impact test that this Court rejected as a constitutional matter in *Davis*. See *Teal*, 457 U.S. at 445-456; *Griggs*, 401 U.S. at 429-436; see also *Fitzpatrick*, 427 U.S. at 453-456 & n.9.[41]

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[41] See also *Rome*, 446 U.S. at 173-178 (upholding statutory prohibition on voting practices with discriminatory effects and requirement of heightened scrutiny through preclearance process, despite ruling that same day that only intentional discrimination violates Fifteenth Amendment); 10 U.S.C. 774 (in response to *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), legislation increasing protection for religious objections to military uniform restrictions); 42 U.S.C. 2000aa (in response to *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), legislation immunizing the press from certain searches). While Section 5 permits Congress to impose additional scrutiny of governmental action to enforce Fourteenth Amendment rights, Congress clearly could not exercise its Section 5 power to undercut

Nor does the fact that, in the course of passing RFRA, members of Congress criticized the *Smith* decision have any bearing on the separation of powers. Congress's authority to legislate does not depend upon its agreement with this Court's decisions. Cf. S. Rep. No. 417 at 2-43 (criticizing *Bolden* decision in enacting the Voting Rights Act Amendments of 1982). In fact, dialogue between Congress and this Court about what the Constitution compels, and what society as a practical matter requires, to protect constitutional rights, is precisely what the separation of powers doctrine in general, and Section 5 in particular, envision.

> All branches of government are, and ought to be, guardians of the Constitution. It is no encroachment upon the private preserve of the Judicial Branch for the Congress to undertake implementation of the First Amendment; it is the duty of Congress to do so. The Judiciary must be the final arbiter, but it is not the sole provider of freedom under the Bill of Rights.

Muir v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1046 n.31 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983).

Petitioner's separation of powers argument proceeds from the mistaken assumption that, in *Smith*, this Court articulated not just a constitutional floor on how little, but also a ceiling on how much, government can accommodate religion. Quite the opposite, *Smith* expressly anticipated a legislative response to its decision:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society

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a constitutionally compelled standard of scrutiny. See *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982).

> that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Congress's decision to enhance the "protection accorded to religious belief" on a nationwide basis thus does not amount to the type of legislative encroachment with which the separation of powers doctrine is concerned.[42]

III. RFRA IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

RFRA fully comports with the Establishment Clause because it is a calibrated legislative accommodation of religion that promotes religious equality. "The limits of permissible state accommodation to religions are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). Rather, government may "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Whatever the outer limits of permissible accommodation, this Court's precedents demonstrate that the lifting of substantial, governmentally imposed burdens on religion in a sectarian-neutral manner does not run afoul of the Establishment Clause. *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987), which petitioner does not discuss, directly demonstrates RFRA's consonance with that

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[42] Courts clearly possess the institutional competence to administer RFRA's test. Strict scrutiny continues to govern hybrid constitutional claims and cases where government either intentionally targets religion or provides for individualized consideration of claims in its statutory scheme. See *Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 881-885. Courts also must inquire into the existence of a substantial or "significant" burden on religious exercise when deciding whether religious accommodations comport with the Establishment Clause. *E.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.).

Clause. Petitioner's argument, by contrast, would require the invalidation of every state constitution and law that, like RFRA, imposes heightened protection for the exercise of religion beyond the *Smith* floor, without providing equivalent protection for non-religious beliefs. See n.26, *supra*.[43]

A. RFRA has a secular legislative purpose. The alleviation of significant governmental interference with religious exercise is a permissible secular purpose, as long as Congress does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335; see also *Kiryas Joel*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment) ("What makes accommodation permissible, even praiseworthy, is * * *

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[43] Petitioner's suggestion (Br. 45-49) that RFRA violates the Establishment Clause, but that identical legislation enacted by a State would not, is wrong. "This Court has confirmed and endorsed th[e] elementary proposition of law time and time again" that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment ha[s] always imposed on the Congress' power." *Wallace*, 472 U.S. at 49; see also *McIntyre* v. *Ohio Elections Comm'n*, 115 S. Ct. 1511, 1514 n.1 (1995); Stevens, *A Century of Progress*, 59 U. Chi. L. Rev. at 25-30. Amicus Clarendon's related argument (Br. 25-28) that the phrasing of the Establishment Clause uniquely disables Congress from enforcing the Fourteenth Amendment's free exercise guarantee is incorrect. First, as noted, properly constructed accommodation statutes like RFRA are not laws "respecting" an establishment of religion. There is no basis in constitutional text, history, or logic for concluding that the Establishment Clause applies with greater disabling force to Section 5 legislation than to legislation passed pursuant to any of Congress's other enumerated powers. Second, the Fourteenth Amendment is itself an amendment to the Constitution and thus must at least stand on equal footing with earlier amendments. Cf. *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1125-1132 (1996). Third, if adopted, amici's argument would call into question countless other federal laws protecting religious exercise, such as Title VII, the Fair Housing Act, and the sacramental wine exemption from Prohibition (National Prohibition Act, ch. 85, Tit. II, § 3, 41 Stat. 308).

that the government is accommodating a deeply held belief."); *Lee* v. *Weisman*, 505 U.S. 577, 628-629 (1992) (Souter, J., concurring). Congress's purpose in enacting RFRA was to advance uniformly the civil rights of all religious adherents; Congress played no favorities. Cf. *Kiryas Joel*, 114 S. Ct. at 2493; *id.* at 2497 (O'Connor, J., concurring in part and concurring in the judgment). Furthermore, by limiting RFRA to instances in which governmental conduct "substantially burden[s]" religious exercise, 42 U.S.C. 2000bb-1, Congress acted only "to alleviate significant governmental interference" with religious autonomy and exercise. *Amos*, 483 U.S. at 335; *Lee*, 505 U.S. at 629 (Souter, J., concurring); cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.). Under these circumstances, the Establishment Clause does not "require that the exemption come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338.[44]

B. RFRA also has a permissible primary effect. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971], it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphasis in original). Thus, exemptions from generally applicable statutes do not constitute impermissible governmental facilitation of religion, because the government neither adds to nor subsidizes the propagation of the religious message. *Ibid.*

As in *Amos*, nothing in RFRA results in the direct advancement or subsidization of religion. RFRA requires only that, on occasion, government must leave religion to

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[44] See also *Kiryas Joel*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in the judgment) ("Accommodations may thus justify treating those who share this belief differently from those who do not.").

operate in its own sphere by exempting persons from generally applicable obligations that substantially burden their religious exercise. See *Kiryas Joel*, 114 S. Ct. at 2493 (permissible accommodations "have allowed religious communities and institutions to pursue their own interests free from governmental interference"). Under RFRA, religious practitioners will not be any better off than before coming into contact with the State; they will simply be less worse off because of the interaction.[45]

C. Finally, RFRA does not impermissibly entangle the religious and the secular. Religious exemptions, as a whole, decrease governmental involvement with religion. *Amos*, 483 U.S. at 339; see also *Kiryas Joel*, 114 S. Ct. at 2493. Like the provision of Title VII at issue in *Amos*, RFRA "effectuates a more complete separation of" government and religious practitioners and avoids the "intrusive inquiry" into religious doctrine and practices entailed by efforts to regulate religious conduct. *Amos*, 483 U.S. at 339; see also J.A. 14, 47 (petitioner and respondent Archbishop Flores agree that involving government in the design of the new sanctuary entangles the City in the Church's affairs).

RFRA, moreover, promotes Establishment Clause values by ensuring that governmental accommodations are equally available to all religions whose faith is substantially burdened by government. By contrast, the piece-

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[45] Unlike the sabbatarian exemption at issue in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), RFRA lifts a governmentally imposed burden on religious exercise, rather than a burden imposed by private parties, and it does so only when the burden is demonstrated to be "substantial." *Id.* at 712 (O'Connor, J., concurring). RFRA, moreover, does not impose an absolute command of accommodation, regardless of the cost to the government or third parties. Cf. *id.* at 709-710 (majority opinion). Rather, through the compelling interest test, RFRA factors the countervailing interests of the government and any burden on third parties into the accommodation calculus. Moreover, RFRA protects all substantially burdened religious beliefs equally. *Id.* at 711-712 (O'Connor, J., concurring).

meal exemption process that petitioner proposes creates a substantial risk that accommodations will not be provided in an even-handed manner. "[T]he legislature itself may fail to exercise governmental authority in a religiously neutral way. * * * [W]e have no assurance that the next similarly situated group seeking [an accommodation] of its own will receive one." *Kiryas Joel*, 114 S. Ct. at 2491; see also *id.* at 2497 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2504 (Kennedy, J., concurring in the judgment); *United States* v. *Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment) ("The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."). RFRA thus promotes important Establishment Clause principles.

IV. RFRA IS CONSISTENT WITH PRINCIPLES OF FEDERALISM

Petitioner contends that "principles of federalism" preclude Congress from requiring States and local governments to adhere to reasonable federal standards designed to enforce Fourteenth Amendment rights. Ample precedent says otherwise. Indeed, RFRA is more responsive to federalism concerns than other Section 5 legislation sustained by this Court.

A. This Court has repeatedly rejected Tenth Amendment challenges to legislation enacted pursuant to the Section 5 power.[46] The Civil War Amendments " 'were

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[46] See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *EEOC* v. *Wyoming*, 460 U.S. at 243 n.18 ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980); *Rome*, 446 U.S. at 179.

specifically designed as an expansion of federal power and an intrusion on state sovereignty.' * * * By its terms, the Fourteenth Amendment contemplates interference with state authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (quoting *Rome*, 446 U.S. at 179); see also *Ex parte Virginia*, 100 U.S. at 346. Because the Constitution does not textually commit zoning matters or religious regulation to the States, RFRA implicates only the general reserve of state authority that is fully subject to Congress's Section 5 power. See *Gregory*, 501 U.S. at 468-470; *EEOC* v. *Wyoming*, 460 U.S. at 239-242; *Ex parte Virginia*, 100 U.S. at 346; cf. *Oregon*, 400 U.S. at 124-131 (Black, J.). Accordingly, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments." *Rome*, 446 U.S. at 179; see also *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1125 (1996).

B. In any event, RFRA leaves petitioner free to pursue its underlying goals and programs, including zoning regulation. Petitioner's "discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." *EEOC* v. *Wyoming*, 460 U.S. at 240 (emphasis in original).[47] RFRA, moreover, is a calibrated and measured limitation on state action. It imposes no flat prohibitions or blanket rules. Rather, Congress simply legislated a statutory standard with which courts and States are already familiar, and which balances States' interests against the individual's religious liberty. See *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) (compelling interest test "strike[s] sensible balances be-

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[47] See also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988) ("That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

tween religious liberty and competing state interests"); 139 Cong. Rec. S14,351-S14,352 (Oct. 26, 1993) (13 State Attorneys General advise that RFRA "strikes a proper balance").[48] As such, RFRA is more solicitous of state prerogatives than other requirements that have been upheld against federalism challenges as permissible exercises of Congress's Section 5 authority (for example, literacy test bans and voting preclearance obligations). "Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC* v. *Wyoming*, 460 U.S. at 239 (upholding imposition of heightened scrutiny on States during era of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)). Only a "substantial" burden on religious exercise triggers RFRA, and the identification of a compelling interest and narrow tailoring will leave the State free to apply its laws as before.[49]

Because the compelling interest inquiry is a context-specific one, RFRA does not dictate a uniform, national answer to the problem of religious accommodation. It instead allows for variation and experimentation among States in light of their unique interests, history, and circumstances. RFRA does "not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight." H.R. Rep. No. 88 at 17 (additional views); *id.* at 16 & n.5 (noting that,

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[48] See also n.26, *supra* (listing state laws that provide equivalent protection for religious exercise).

[49] Although petitioner makes much of the scope of RFRA's coverage (Br. 21), RFRA's balancing test pales in comparison to the breadth and depth of intrusion on States' autonomy accomplished by the Voting Rights Act and Civil Rights Acts. The most that RFRA demands is occasional exemptions from—not the general displacement of—state law.

prior to *Smith*, government won the majority of free exercise cases even though they were litigated under the compelling interest standard); cf. *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995) (strict scrutiny is not "strict in theory, but fatal in fact").

C. Petitioner's reliance on *New York* v. *United States*, 505 U.S. 144 (1992), is misplaced. *New York* struck down portions of a federal law that required States either to enact legislation for the disposal of radioactive waste or to take title to the waste. That scheme bears little resemblance to RFRA. First, *New York* addressed Congress's power to legislate under the Commerce Clause. The decision thus does not implicate established principles concerning the general inapplicability of federalism objections to Congress's use of its Section 5 power, which is a direct authority to regulate States. See pp. 44-45, *supra*; cf. *Seminole Tribe*, 116 S. Ct. at 1125.

Second, RFRA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176 (citation omitted). States need not undertake or forgo any particular regulatory activity. RFRA simply provides that whatever actions are undertaken that substantially affect religious freedom must be accomplished consistent with federal norms, just as States currently must conduct their affairs within the constraints of Title VII, the Age Discrimination in Employment Act, and the Voting Rights Act. See *EEOC* v. *Wyoming*, 460 U.S. at 236-243 & n.18; *Fitzpatrick*, 427 U.S. at 451-457.[50]

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[50] The State amici object (Br. 1-6, 24-25) to RFRA's application to prisons. In evaluating petitioner's facial challenge to RFRA, concerns about frivolous prisoner litigation should not be allowed to cap Congress's authority under the Fourteenth Amendment to protect the civil rights of the rest of society. Cf. *Salaam* v. *Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) (*Smith* "simply brings the free exercise rights of private citizens closer to those

Third, RFRA does not obscure political accountability for the costs of its enforcement. Indeed, the federal gov-

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of prisoners"), cert. denied, 498 U.S. 1026 (1991). Furthermore, the question of RFRA's applicability to prisons was the subject of specific and extensive debate. See 139 Cong. Rec. S14,350-S14,368 (Oct. 26, 1993), S14,461-S14,471 (Oct. 27, 1993); H.R. Rep. No. 88 at 8; S. Rep. No. 111 at 10. Cf. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-552 (1985). While Congress ultimately agreed with 13 State Attorneys General that RFRA's balancing test should also apply in the prison context, Congress emphasized that courts should "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." S. Rep. No. 111 at 10; see also H.R. Rep. No. at 8; 139 Cong. Rec. S14,361 (Oct. 26, 1993) (Sen. Hatch). That RFRA is sensitive to the unique conditions of the prison environment is demonstrated by the fact that, in every prison case cited by the State amici (Br. 4-5), the prison authorities prevailed. Of the 85 prison RFRA cases we are aware of that have gone to final judgment (based on a Westlaw search), prison authorities won 82. While the States object that they are still obliged to litigate RFRA claims, they do not contend that RFRA has increased the overall volume of prisoner litigation. Cf. 139 Cong. Rec. S14,464 (Oct. 27, 1993) (Sen. Coats) ("[p]risoner religious exercise suits were less than 1 percent of all prisoner civil rights cases in Ohio when RFRA's higher standard of review was in force"). Rather, in our experience, RFRA claims are almost invariably joined with other claims, so that the case would have to be litigated anyway. See *id.* at S14,363 (Oct. 26, 1993) (Sen. Hatch) (noting that an increase in prisoner filings followed the issuance of the *Smith* decision and that "prisoners are going to institute a large number of lawsuits regardless of the standard of review applicable to prison lawsuits * * * [b]ecause prisoners do not have many other things to do"). Finally, should real problems surface, Congress can impose procedural requirements that inhibit meritless prisoner filings. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, § 803(d), 110 Stat. 1321-71 (1996); 42 U.S.C. 1997e.

ernment is equally subject to RFRA's terms. Cf. *New York*, 505 U.S. at 182-183.[51] As a result, RFRA

> limit[s] the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. * * * [T]his promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

Pointer v. *Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring). "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments * * *. [T]he Constitution divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181.

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[51] Petitioner objects that Congress could legislatively exempt itself from RFRA. Congress, however, went to great lengths to ensure RFRA's continued application to federal law. All federal laws are covered. 42 U.S.C. 2000bb-2, 2000bb-3(a). Future law is exempted only if both Houses and the President explicitly agree in the text of that legislation to exclude RFRA. 42 U.S.C. 2000bb-3(b). That is the same legislative process that is available to the States to obtain exemptions from or limitations on RFRA. Given that all Section 5 enforcement is through legislation and that one Congress cannot pass laws irrevocably binding subsequent Congresses (see *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2453-2455 (1996) (opinion of Souter, J.)), Congress did all it could to ensure the federal government's own continued obligation to comply with RFRA's terms.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1997

APPENDIX

1. The First, Tenth and Fourteenth Amendments to the United States Constitution provide, in pertinent part:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. The Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, provides:

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1997 417722 40234

(27)

Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

No. 95-2074

In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

and

UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF LATE AUTHORITY

On January 27, 1997, the United States Court of Appeals for the Ninth Circuit ruled that the Religious Freedom Restoration Act (RFRA) is a valid exercise of congressional authority under Section Five of the Fourteenth Amendment and that it does not violate the Establishment Clause. *Mockaitis v. Harcleroad*, No. 96-35901, 1997 U.S. App. LEXIS 1274; 1997 WL 27111 (9th Cir. Jan. 27, 1997). In one paragraph, the court of appeals rejected the State's Section Five argument, relying exclusively on the expansive reading of Section Five in *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). *Mockaitis*, 1997 U.S. App. LEXIS, at *20-21; 1997 WL 27111, at *8. The court then rejected the State's argument that RFRA violates the Establishment Clause because exemptions advance religion and because RFRA forces courts to define "religion." *Id.* The court of appeals did not address the separation of powers violation posed by RFRA or the Section Five and Establishment Clause arguments raised by Petitioner in this case.

ARGUMENT

I. RFRA IS A STATUTE THAT REDEFINES THE MEANING OF THE FREE EXERCISE CLAUSE AND THEREFORE VIOLATES THE SEPARATION OF POWERS

Neither Respondents nor any *amici* supporting Respondents come to terms with the City's separation of powers argument. Respondents' interpretation of the separation of powers is more accurately labeled a theory of the "duplication of powers." It fails to reflect the Framers' fundamental insight that the *core functions* of each branch must be kept distinct – a separation of federal powers that protects not only individual liberty, but also the powers reserved to the States. *The Federalist* No. 47, at 302-03 (James Madison) (Clinton Rossiter ed., 1961); *see Loving v. United States*, 116 S. Ct. 1737, 1743 (1996); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453-56 (1995). For the Framers, the legislative branch was the least trustworthy:

> [The legislative department's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask,

> under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.
>
> . . . .
>
> . . . [Legislatures] have accordingly, *in many* instances, *decided rights* which should have been left to *judiciary controversy* . . . .

The Federalist No. 48, at 310-11 (James Madison).

That RFRA invades the Court's core function and thus oversteps the line of separation between the legislative and judicial branches is evident from the following brief, straightforward principles, which Respondents do not contravene:

(1) In *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court engaged in the distinctive judicial function of resolving an Article III case or controversy by reading and interpreting the relevant constitutional text.

(2) The *Smith* majority performed a "permissible reading of the text" of the Free Exercise Clause so as to limit its scope to laws that are "specifically directed at . . . religious practice." *Id.* at 878. The Court thereby rejected a reading that would also apply the Clause to general and otherwise valid neutral laws that incidentally burden religious exercise. *Id.* at 885; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (affirming *Smith* approach to free exercise challenges).

(3) Under this Court's reading of the Clause, which categorically excludes neutral and generally applicable laws, such laws need not be justified by a compelling governmental interest even though religious practices are incidentally burdened. On the other hand, a law targeted at religious exercises could be valid, under the Court's reading of the Free Exercise Clause, only if justified by a compelling governmental interest. *See Lukumi*, 508 U.S. at 531-33; *Smith*, 494 U.S. at 878. All of which demonstrates that the decision whether to employ the compelling governmental interest doctrine is an integral part and a necessary consequence of the judicial function of interpreting the text of the Free Exercise Clause in the context of Article III cases and controversies.

(4) RFRA is solely a directive to the federal and state judiciary to expand the reading of the Free Exercise Clause to

cover those laws that are neutral and generally applicable. *See* 42 U.S.C. §§ 2000bb(a)(1)-(2), (b)(1), 2000bb-1(a)-(b) (1994). The *Smith* textual reading plainly excluded such laws from free exercise inquiry. *Smith*, 494 U.S. at 885-90. Under the guise of creating a "statutory" cause of action to support a legislatively-preferred reading of the Free Exercise Clause, Congress has taken over the judicial function of interpreting the Constitution in the context of adjudicating cases. To quote the organization that "drafted, lobbied for, and ultimately secured the passage of" RFRA, "*Congress did say [with RFRA] that the Free Exercise Clause means something other than what this Court says it means.*" *See* Coalition for the Free Exercise of Religion Br. at 1, 27 (emphasis added) [hereinafter Coalition Br.].

"The enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress," *Keeler v. Mayor & City Counsel of Cumberland*, 928 F. Supp. 591, 603 (D. Md. 1996), but rather is an aggrandizement of Congress's power at the expense of this Court's core constitutional function. *Cf. Smith v. Fair Employment & Housing Commission*, 913 P.2d 909, 937 (Cal.) (Mosk, J., concurring), *petition for cert. filed*, 65 U.S.L.W. 3034 (U.S. July 8, 1996). *See generally* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 111 (1996).[1]

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[1] Even Congress's factfinding in RFRA is more akin to judicial activity than legislative. *See* Pet'r Br. at 12-26. Instead of conducting studies or asking various experts to analyze the state of religious liberty in the United States today, which one would have thought appropriate before passing a law that affects every law in the United States, Congress merely looked to post-*Smith* court decisions. S. Rep. No. 103-111, at 2-10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893-99; H.R. Rep. No. 103-88, at 2-9 (1993); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 112, 157-58, 334-39, 361-71 (1992); *Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. On the Judiciary*, 102d Cong., 2d Sess. 10-12, 50-58, 71-76 (1992). The closest example of a study on religious liberty in the United States to be found in the RFRA legislative history or these proceedings is

Those *amici* who argue that RFRA need not be invalidated if this Court were to overturn *Smith*, *see infra* note 3, completely miss the separation of powers violation that occurred when Congress passed RFRA. *See* Catholic Conference Br. at 26-30; Commonwealth of Virginia Br. at 12-13; Rutherford Inst. Br. at 3-4. Even if this Court were to overturn *Smith* today, Congress overstepped its bounds when it enacted RFRA by imposing its interpretation of the Free Exercise Clause on the courts.

Overturning *Smith* is not the panacea that would salvage RFRA. As the City previously explained in detail, RFRA does not reflect the true state of this Court's free exercise doctrine before *Smith*. Pet'r Br. at 15-19. In order for this Court to make its free exercise doctrine match RFRA, it would have to institute an across-the-board compelling interest standard coupled to a least restrictive means test, which would apply in *every* situation – from government administration of services to prison oversight, unemployment compensation, drug laws, marriage laws, statutory rape laws, and child abuse laws. This Court has never treated *any* clause of the First Amendment to such an unforgiving standard, nor should it. *See, e.g., United States v. Eichman*, 496 U.S. 310, 318 (1990) (holding that where prohibition on speech is content-based it is "subjected to the most exacting scrutiny"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227-31 (1990) (holding that licensing schemes vesting unbridled discretion in the decision maker are subject to procedural safeguards); *Ward v. Rock Against Racism*,

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Respondent Flores' reference to two Gallup polls on public perception of certain religions. Resp't Flores Br. at 30.

In response to those claiming that Congress's fact finding for RFRA was adequate, *see* Resp't United States Br. at 26-27 n.25; Resp't Flores Br. at 29-36; ABA Br. at 7; American Jewish Congress Br. at 17; Hatch, *et al.* Br. at 28; Prison Fellowship Br. at 22-23; it must be emphasized that the handful of anecdotes that constitute the entirety of Congress's so-called factfinding in this instance must be measured against the *scope* of the statute. While anecdotes and case reports might be sufficient for a narrow statute impacting a narrow class, RFRA's application to every law enacted by every government, past or present, should demand significantly more factfinding. In fact, the statistical comparison of RFRA's factfinding to its scope would indicate that it approaches zero.

491 U.S. 781, 798-99 (1989) (holding that time, place, and manner restrictions on speech are subject to intermediate scrutiny); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (holding that where a statute which forbids the use of violence fails to distinguish the "mere advocacy" of violence from the "incitement to imminent lawless action," such a statute violates the constitutional guarantees of free speech and freedom of the press); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that non-content based speech is subject to intermediate scrutiny).

II. RFRA IS NOT A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

A. The Defense of RFRA as a Statute that Enforces the Equal Protection Clause Is a Pretext to Hide the Fact that the Purpose and Effect of RFRA Is to Amend the Meaning of the Free Exercise Clause and to Impose Congress's Interpretation on the States

Reading the Respondents' and their *amici*'s briefs is akin to Alice's experience when she gazed into the looking glass. "[T]hen smoke comes up in that room too – but that may be only pretence, just to make it look as if they had a fire." Lewis Carroll, *Through the Looking Glass, in Alice's Adventures in Wonderland and Through the Looking Glass* 193-94 (Puffin Books 1962) (1872). They repeatedly claim that RFRA is an equality statute intended to enforce the guarantees of the Equal Protection Clause. *See* Resp't United States Br. at 24-27, 30-32; Resp't Flores Br. at 36-37; ABA Br. at 12-15; Coalition Br. at 7; Hatch *et al.* Br. at 7, 16-19; NAACP Br. at 8-20; Prison Ministries Br. at 19-23. This is a last-ditch, *post hoc* effort by Respondents and their *amici* to preserve a statute that mocks constitutional limitations.

If RFRA is an equal protection statute, as the Respondents claim, it is curiously silent on this aspect. Unlike many statutes, RFRA has explicit "Findings" and "Purpose" sections, *see* 42 U.S.C. § 2000bb(a)-(b), neither of which support Respondents' equal protection characterization of the Act. The fact is that the words "discrimination" or "equality" do not appear in the Act, and the Act never refers to the Equal Protection Clause. Nor does

RFRA limit itself to minority religions. The legislative history's references to minority religions constitute an insignificant portion of the total.[2]

The truth is that RFRA was passed for the purpose of expanding the scope of the Free Exercise Clause of the First Amendment. *See* 42 U.S.C. § 2000bb(a)(1)-(4). RFRA explicitly refers to the First Amendment and outlaws burdens on religious conduct in every conceivable context. 42 U.S.C. §§ 2000bb(a)(1), 2000bb-2(4), 2000bb-3(a). Far from being a rule aimed at discrimination, the statute "guarantee[s the] application [of the compelling interest test and the least restrictive means test] *in all cases where free exercise of religion is substantially burdened.*" 42 U.S.C. § 2000bb(b)(1) (emphasis added). *See also* 42 U.S.C. § 2000bb(a)(2) ("[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

Were Congress inclined to enact a rule against discrimination aimed at particular religions or religious practices, it would not look like RFRA. Rather, it would echo Title VII's religious anti-discrimination provisions, which provide:

> It shall be an unlawful employment practice for an employer [private or state] to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1) (1994) (emphasis added).

Title VII's religious anti-discrimination provisions make clear that if Congress wanted to draft a statute outlawing discrimination on the basis of religion, it knows how to do so. Plainly, Title VII does not provide for the free exercise of religion in general. Rather, it protects only against discrimination on the basis of religion. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711-12 (1985)

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[2] With their equal protection defense of RFRA, Respondents are asking this Court to interpret RFRA solely on the basis of six percent of its legislative history, to ignore the remaining 94% of the legislative history, and, most importantly, to ignore the plain text of the Act.

(O'Connor, J., concurring) (characterizing Title VII's religious accommodation provisions as "anti-discrimination law" and "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause"). The drafters of RFRA were fully aware of Title VII's religious anti-discrimination provisions, yet drafted a completely dissimilar law. *See* S. Rep. No. 103-111, at 13 (stating that "[n]othing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964").

Unlike the anti-discrimination inquiry copiously described and dissected by this Court in *Lukumi*, 508 U.S. at 532-35 (Kennedy, J.), *Id.* at 557-59 (Scalia, J., concurring), *Id.* at 560-64 (Souter, J., concurring), RFRA makes proof of discrimination, whether purposeful or in effect, inapposite to the inquiry.[3] Indeed, *the primary purpose of RFRA is to bring nondiscriminatory, or neutral, exercises of governmental authority into the strict scrutiny fold. See* 42 U.S.C. §§ 2000bb(a), (a)(2), (a)(4), 2000bb-1(a).

The equal protection justification for RFRA renders the Act overinclusive and underinclusive. If RFRA's purpose is to eliminate discriminatory actions taken against minority faiths, the Act is plainly overinclusive. By its terms, it covers every substantial burden on religion, not just those that are discriminatory in purpose or effect. *See 1992 Senate Hearing*, at 63 (statement of Douglas

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[3] The goal of the political powers that assembled to press RFRA upon Congress was starkly singular: overrule *Smith* and set in its place a rule against any substantial burdening of religious conduct. That goal remains apparent in the *amici* briefs filed in support of Respondents urging this Court to overturn *Smith*. *See* Commonwealth of Virginia Br. at 7-12; Minn. Family Council *et al.* Br. at 14-19; Nat'l Right to Work Legal Defense Found. Br. at 6-8; Rutherford Inst. Br. at 3-5. Apparently worried about RFRA's constitutional infirmities, Respondents' *amici* are now asking this Court, rather than Congress, to satisfy their demands to overturn the rule this Court announced in *Smith* and affirmed in *Lukumi*. *Smith*, 494 U.S. at 885-86; *Lukumi*, 508 U.S. at 531. The suggestion to reconsider *Smith* is not encompassed by the Questions Presented in this facial challenge to RFRA. Nor was the validity of *Smith* the basis of the decisions below. *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1126 n.10 (1996); *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 116 S.Ct. 873, 880 n.5 (1996).

Laycock) (stating that RFRA "would do much to correct the errors of *Smith*, and those errors affect not only minority or immigrant religions that are well outside the mainstream, but also mainstream faiths").

In a written submission to Congress, Douglas Laycock stated the following:

> [D]eliberate persecution is not the usual problem in this country. Churches and religious believers can lose the right to practice their faith for a whole range of reasons. . . . But *whether regulation results from hostility, or indifference, or ignorance, the consequence to believers is the same.*

1992 House Hearings at 334-35, 337 (emphasis added); *see also 1992 Senate Hearing* at 71-72. In sum, the purpose and effect of RFRA is to outlaw religious burdens *per se*, without regard to discrimination.

The Act's substantial overinclusiveness violates the Constitution's inherent principles of federalism and dual sovereignty by making "presumptively invalid," *Smith*, 494 U.S. at 888, thousands of local, state, and federal laws which do not discriminate.[4] Principles of federalism demand invalidation of RFRA's strict scrutiny

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[4] The Act's overinclusiveness could not be more apparent than it is in this case, which is not predicated on discrimination and which does not involve a "minority" religion, but rather a powerful, mainstream religion which is particularly powerful in South Texas, where the City of Boerne is located.

If Respondents' defense of RFRA as a measure to curb discrimination against minority faiths were correct, the Catholic Church would not be part of the class of intended beneficiaries of the Act. *See Piper v. Chris-Craft Industries*, 430 U.S. 1, 37 (1977) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975) (holding that a person invoking the statute must be "one of the class for whose *especial* benefit the statute was enacted")). The Church maintains that the membership of St. Peter Church is "2,170 and growing." Resp't Flores Br. at 1. Given that the estimated population of Boerne is 5,500, the Church's membership is approaching 40% of the population. In light of the Church of Jesus Christ of Latter Day Saints' definition of a minority religion as constituting less than 1.5% of the population, Latter-Day Saints Br. at A-2, Boerne's St. Peter Church is an extraordinarily powerful political force, not one of the politically disempowered minority

standard that overreaches into so many local and state laws, even if the Act could be applied constitutionally, per *Lukumi*, in the rare instances where there is anti-religious discrimination against a minority religion. *See New York v. United States*, 505 U.S. 144, 155-59 (1992) (discussing federalism structure inherent in the Constitution).

The Act is simultaneously underinclusive if it is intended to protect minority religions from discrimination. Only those discriminatory actions that result in a substantial burden on religion are redressed by the Act. Any lesser burden will not be redressed, no matter how blatant or distasteful the discriminatory action is. The number of cases in which a discriminatory action is not a substantial burden is significant. *See, e.g., Merritt-Bey v. Delo*, No. 93-2194, 1994 U.S. App. LEXIS 14892; 1994 WL 263780 (8th Cir. June 17, 1994) (finding prison officials' unequal allocation of resources and facilities among religious groups insufficient to constitute a "substantial burden").[5]

The Act's substantial over- and underinclusiveness prove that Respondents' equal protection justification is a pretext. Respondents' attempt to drape RFRA with an equal protection justification

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religions Respondents claim to be the intended beneficiary of the Act. *See, e.g.*, Resp't United States Br. at 25-27. *See generally* Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 Iowa L. Rev. 833, 835 (1996) (book review) (indicating that Christian religions exercise tremendous political power).

[5] The concerns expressed by *amici* regarding the fate of minority religions in the legislative process, as well as by this Court in *Smith*, 494 U.S. at 890, may be overstated. *See* ABA Br. at 6; Coalition Br. at 13-16; Hatch *et al.* Br. at 28; Kennedy *et al.* Br. at 28; Latter-Day Saints Br. at 10-12; NAACP Br. at 8-12. Political science makes clear that small, cohesive groups with an identifiable message do quite well in the legislative process. They fare better than amorphous, large majorities. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 127-28, 144 (1971). A good example of the ability of a minority religion to obtain legislative relief from a generally applicable law is Oregon's law exempting peyote use for religious purposes from its generally applicable anti-drug laws, which was passed following *Smith*. Or. Rev. Stat. Ann. § 475.992(5)(a) (Supp. 1996).

is a thinly disguised attempt to shoehorn RFRA into existing equal protection statutes and precedents. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 359 (1819) ("[T]he judicial department- . . . will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government.").

The true nature of RFRA cannot be gainsaid: it is a congressional attempt to define the substantive scope of the First Amendment's Free Exercise Clause. It nullifies *Smith*'s holding by reinstating the Court's earlier decisions "set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which are to govern in all cases where free exercise of religion is substantially burdened. . . . " 42 U.S.C. § 2000bb(b)(1). There is no subtlety here. Congress rejected this Court's prevailing precedent and placed its institutional might behind two earlier precedents. This alters the constitutional calculus, violates the separation of powers, and exceeds Congress's authority under Section Five of the Fourteenth Amendment. Far from being a legitimate exercise of Section Five authority to enforce the Equal Protection Clause, RFRA is a redefinition of the Free Exercise Clause that undermines this Court's authority and threatens the States' sovereignty.

B. RFRA Is Not Analogous to Laws that Shift the Burden of Proving Discrimination from an Intent Test to an Effects Test

The Church pins all of its hopes on its inaccurate description of RFRA as a statute that "dispense[s] with proof of deliberate or overt discrimination[.]" Resp't Flores Br. at 29; *Id.* ("That is the only question presented here . . . . "). The simple truth is that the Act does not implicate such burdens of proof. Far from lowering the burden of proof for those charging discriminatory treatment from a discriminatory intent standard to a discriminatory effects standard, which this Court has permitted Congress to do in the equal protection context for the purpose of enforcing constitutional guarantees, *compare Washington v. Davis*, 426 U.S. 229, 238-48 (1976), *with Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982),

RFRA makes discrimination, either in purpose or effect, utterly irrelevant to the Free Exercise inquiry.

Congress has been prescribed broad authority to compel obedience to constitutional guarantees. This formulation explains the statutes listed by the Church. *See* Resp't Flores Br. at 10-18; *see also* Resp't United States Br. at 37-39. When this Court has addressed the constitutionality of these statutes, it has upheld them as appropriate means to enforce constitutional guarantees. *See Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980); *Maher v. Gagne*, 448 U.S. 122, 132 (1980); *City of Rome v. United States*, 446 U.S. 156, 158 (1980); *Hutto v. Finney*, 437 U.S. 678, 695 (1978); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 261-62 (1970); *Morgan*, 384 U.S. at 651-52; *James Everhard's Breweries v. Day*, 265 U.S. 545, 558-60 (1924); *National Prohibition Cases*, 253 U.S. 350, 387-88 (1920); *see also* S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 186-87 (stating that 1982 amendments to Voting Rights Act of 1965 "remain necessary and appropriate legislation to ensure the full enforcement of the rights guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution"). Even the Pregnancy Discrimination Act (PDA), which the Church argues is an example of a substantive increase in constitutional rights, Resp't Flores Br. at 15, is more accurately understood under the first holding of *Morgan*, 384 U.S. at 651-53, Pet'r Br. at 33-34, as an example of Congress employing its factfinding capacities to conclude that it is necessary to outlaw a particular category of discrimination (here, pregnancy discrimination) that is not unconstitutional on its face in order to prevent what is a constitutional violation (here, sex discrimination). *See Bray v. Alexandria Clinic*, 506 U.S. 263, 331 (1993) (Stevens, J., dissenting).

In contrast, Congress does not have the authority – necessary to uphold RFRA – to adjust constitutional guarantees themselves. In a nutshell, Congress has the capacity to choose the means necessary and appropriate for enforcing the Fourteenth Amendment, but not the authority to choose constitutional ends. It is this calculus which makes sense of the phrase quoted by the Federal Government, " 'The Judiciary must be the final arbiter, but it is not the sole provider of freedom under the Bill of Rights.' " Br. at 39 (quoting *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d

1033, 1046 n.31 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983)).

Neither Respondents nor any of the *amici* in support of Respondents mention the crucial point that the decision in the employment context to move from a discriminatory intent test to a discriminatory effects test was the result of in-depth studies by experts who analyzed employment discrimination from the perspective of "systems." What Congress took from these experts is that the "mechanics" of employment practices perpetuate previously intentional discrimination. Thus, discriminatory effects were indicators of past, if not present, intentional structural discrimination. *See* H.R. Rep. No. 92-238 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 2137. This history is a far cry from Congress's knee-jerk response to *Smith*, and reveals the way in which the effects test in the discrimination context in fact enforces *constitutional* guarantees.

The purpose and effect of RFRA is to increase the level of protection for religious claimants *whether they were the victims of discrimination or not*. *See* Pet'r Br. at 19, n.3.[6] RFRA simply is not limited to a plausible class subject to or even *likely* to be subject to discrimination. *See, e.g.*, *Rome*, 446 U.S. at 172-73; *Morgan*, 384 U.S. at 652-56. It is not the purpose of RFRA to fine-tune the rule against discrimination announced in *Lukumi*, but rather to overturn the holding of *Smith* by

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[6] In an attempt to turn this Court's attention from the fact that Congress found itself competent to define the meaning of the Free Exercise Clause in RFRA, Respondents and *amici* argue that Congress's motive is irrelevant to the constitutional inquiry. Resp't Flores Br. at 32-33; Hatch *et al.* Br. at 22; Prison Fellowship Br. at 24, n.46. The City has no quarrel with that settled constitutional principle. But congressional *purpose* certainly is relevant to determining the meaning of a statute. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 864 (1992) ("Conceptually, however, one can ascribe an 'intent' to Congress in enacting the words of a statute if one means 'intent' in its, here relevant, sense of 'purpose' rather than its sense of 'motive.' "). The purpose and effect of RFRA are to redefine the scope of the First Amendment.

bringing neutral, generally applicable laws under the strict level of scrutiny that the Court has declared is appropriate only in cases of discrimination. *Lukumi*, 508 U.S. at 531-33.

C. Invalidating RFRA Does Not Threaten the Validity of Other Statutes Enacted Pursuant to Section Five of the Fourteenth Amendment

Contrary to Respondents' anxious tone, the sky will not fall if this Court wisely invalidates Congress's foray into the judiciary's singular preserve and the States' sphere of authority. Neither Respondents nor *amici* in support of Respondents cite a single instance where Congress has so dramatically altered the substantive scope of an entire clause of the Constitution, let alone where the Court has upheld the exercise of such power. As the City noted in its merits brief, no true analogues to RFRA exist. Pet'r Br. at 29. RFRA's invalidation would not threaten Title VII or any other statute, but rather would halt this affront to the Constitution's structural integrity, which secures the balance of power between the federal branches, between church and state, and between the federal government and the states.[7]

Section Five of the Fourteenth Amendment gives Congress the power to "enforce" the constitutional guarantees found in the Amendment. The plain meaning of the term

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[7] Title VII's extension to state employers in 1972, *see* 42 U.S.C. § 2000e(a), does not provide support for RFRA. Unlike RFRA, where Congress enacted a law to *redefine* constitutional evils, Title VII was passed for the purpose of redressing the constitutionally recognized evil of discrimination. Title VII's legislative history says as much: "The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in Federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited." H.R. Rep. No. 92-238 at 2153 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 2153; *see also Moore v. City of San Jose*, 615 F.2d 1265, 1273 (9th Cir. 1980) ("Title VII was meant . . . to create an additional remedy to redress discrimination that was already unlawful.").

"enforce" is "to force compliance with" or "to compel obedience to." That meaning is consistent with late nineteenth century legal dictionaries. *See* William C. Anderson, *A Dictionary of Law* 466 (1891) (under "force") ("To constrain, or compel; to give effect to: as, to enforce an order of court; Congress may enforce constitutional prohibitions by appropriate legislation . . . . "); Arthur English, *A Dictionary of Words and Phrases Used in Ancient and Modern Law* 322 (1899) (defining "enforce" as "to cause to have force and effect. To compel obedience to"); *see also* Henry C. Black, *A Law Dictionary* 425 (2d ed. 1910) ("To put into execution; to cause to take effect; to make effective . . . . "). It is ridiculous to claim that RFRA compels obedience to the constitutional rights under the Free Exercise Clause announced in *Smith*. Pet'r Br. at 22-23.

Certainly, the Court has approved surgical application of prophylactic standards to voting practices based on a record of abuses, *see Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *see also Rome*, 446 U.S. at 182; *Gaston County, N.C. v. United States*, 395 U.S. 285, 291 (1969), and it has not declared the application of prophylactic standards to States as employers unconstitutional. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 457, n. 11 (1976). The City does not question Congress's authority to prevent constitutional violations through appropriate means.

This Court's expansive reading of congressional power vis-a-vis the Equal Protection Clause should be the zenith of congressional authority, however, not the springboard for ever-expansive federal power. Thus, the Voting Rights Act and Title VII can stand as exercises of prophylactic power, but RFRA must fall as a statute that enforces no constitutional guarantees but rather attempts to recast such guarantees. Drawing the line at those examples of the exercise of prophylactic power in specific arenas leaves RFRA considerably beyond Congress's reach. In fact, the Court can issue a decision in this case as narrow as RFRA is broad.

Congressional power, or lack thereof, exists on a spectrum of possibilities. The difference between existing prophylactic

equal protection rules and RFRA is not merely a matter of degree. It is a difference in kind. RFRA crosses the line from being remedial to being a constitutional amendment. No law passed as a prophylactic measure to ensure equal protection guarantees is threatened if this Court invalidates Congress's attempt in RFRA to redefine the scope of the Free Exercise Clause.

Invalidating RFRA will not require the invalidation of any other law or threaten any Supreme Court precedent. Indeed, it is the maintenance of RFRA that will cause havoc. If RFRA is upheld, the door will be opened to a previously unwitnessed increase in federal power against the States. If this Court were to adopt the Church's suggestion that Section Five authority should be judged according to whether the law has a "reasonable nexus" to a constitutional right, Resp't Flores Br. at 25, Congress's power under Section Five would be boundless. Under the suggested "reasonable nexus" standard, the federal government could impose the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1994), on the States as laws that have a reasonable nexus to procedural due process guarantees. Congress, in effect, would have been handed a plenary police power over the States that would wipe out the federalism principles inherent in Section Five. The Constitution's inherent federalism principles require a close textual reading of Section Five, which is to say that Section Five only permits Congress to "enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. U.S. Const. amend. XIV, § 5.

D. Section Five of the Fourteenth Amendment Does Not Give Congress Authority to Define the Substantive Reach of the Constitution

The most curious argument raised by *amici* supporting Respondent regarding Congress's Section Five powers appears in the brief filed by Senator Orrin Hatch, *et al.*, which once again brings Alice in Wonderland to mind when she said, "that's just the same . . . only the things go the other way."

Carroll, *supra*, at 192-93. In that brief, the Senators rightly point out that Congress does not have the constitutional authority to ratchet up, or to substantively increase constitutional liberties. Hatch *et al.* Br. at 15-16; *see also* Pet'r Br. at 23. The Senators endorse the City's view that the substantive power theory, which is an alternative holding of *Morgan*, 384 U.S. at 648-53,[8] and which is wholeheartedly embraced by the Church, Resp't Flores Br. at 49, violates the Constitution. Hatch *et al.* Br. at 20-24. But they then defend RFRA's expansion of the Free Exercise Clause on the grounds that it is a "statute" rather than a constitutional amendment. Hatch Br. *et al.* at 24-30. Apparently, their theory is that so long as Congress *calls* an attempted constitutional amendment a "statute," Congress is within the scope of its Section Five authority. Surely, this Court has the constitutional authority, indeed the obligation, to elevate substance over form. Whatever Congress calls RFRA, it is a dramatic increase in the scope of the Free Exercise Clause of the First Amendment, and, per Senator Hatch's theory, should be invalidated as beyond Congress's authority.

The fact that some of the states claim to be willing to accept the imposition of RFRA's higher standard under the Free Exercise Clause, *see* Maryland Br. at 6-18; Texas Br. at 20-25; Virginia House Br. at 5-11, does not make it constitutional for Congress to impose that standard on them. *See New York v. United States*, 505 U.S. at 181-82 (holding that where Congress exceeds its authority relative to the States, the departure from the constitutional plan cannot be ratified by the "consent" of state officials).

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[8] The United States's brief inaccurately characterizes the City's position regarding *Morgan*. *See* Resp't United States Br. at 9-17. The City has not asked to overturn the case in its entirety, but rather, only the substantive power theory implicit therein.

III. RFRA CAUSES GOVERNMENTS TO INVESTIGATE THE THEOLOGY OF EVERY RELIGION RESIDENT WITHIN THEIR BOUNDARIES AND THEREFORE IMPERMISSIBLY ENTANGLES GOVERNMENT AND RELIGION

Contrary to the mischaracterization of the City's position by the Coalition for the Free Exercise of Religion, the City does not believe that individual exemptions from generally applicable laws raise necessary Establishment Clause concerns. *Compare* Coalition Br. at 8, *with* Pet'r Br. at 48. The error in RFRA is its wholesale elevation of the authority and power of all religions, an error not reflected in individualized exemptions.

RFRA's blanket least restrictive means test places governments in a much less comfortable position than the Coalition would lead this Court to believe. *See* Coalition Br. at 3-11. The Coalition suggests that government may wait until a legal claim is raised in order to craft an exemption, implying that governments may make laws in ignorance of resident religions and then correct those laws through RFRA litigation. Coalition Br. at 11-12. The truth is that the federal attorney fee provisions, 42 U.S.C. § 1988 (1994), require responsible governments to worry about likely exemptions from all quarters long before a legal claim is filed against a generally applicable statute.

RFRA provides a legal cause of action to be vindicated in the courts. *See* 42 U.S.C. § 2000bb-1(c). Any change a government makes in a law in response to a RFRA claim can create "prevailing party" status under 42 U.S.C. § 1988(b), opening the government to an award of attorney's fees for the claimant. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 112-14 (1992); *Hanrahan v. Hampton*, 446 U.S. 754, 756-58 (1980). To guard against attorney fee liability, a government has two choices: (1) become expert on those religions within its jurisdiction, so as to craft laws without substantially burdening any religious practice; or (2) in lieu of becoming expert on every religion within its boundaries, to consult with a council of religious advisors every time a law is passed. Either avenue leads to impermissible entanglement. *See Larson v. Valente*, 456 U.S.

228, 252-55 (1982); *Levitt v. Committee for Public Ed. and Religious Liberty*, 413 U.S. 472, 481-82 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[9]

IV. THE HISTORY OF RELIGIOUS EXEMPTIONS IS IRRELEVANT TO THIS CASE

Whether or not there is historical support for the legality of court-ordered exemptions from generally applicable laws, *compare* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1420 (1990), *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 947-48 (1992), it is farfetched to believe that the Framers would have viewed RFRA as a legitimate exercise of *congressional* authority. The Federalists opposed a bill of rights, declaring that it was unnecessary because the Constitution gave Congress no authority to enact any laws over issues of conscience, religion, or speech. *The Federalist* No. 84 at 513 (Alexander Hamilton) ("For why declare that things shall not be done which there is no power to do?"); Leonard W. Levy, *Legacy of Suppression & Freedom of Speech and Press in Early American History* 225-26 (1960).

The Federalists asserted that an enumerated set of powers would limit the exercise of congressional power and assumed that Congress would not act within any sphere not specifically denominated. *The Federalist* No. 84 at 515 (Hamilton) ("The truth is, . . . that the Constitution is itself . . . a bill of rights."); Levy, *supra*, at 225. Therefore, they reasoned, a bill of rights would only cause mischief by providing a list of the people's liberties that might later be construed to be limited to that list. *The Federalist* No. 84 at 513 (Hamilton) ("[A bill of rights] would contain various exceptions to powers which are not

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[9] The United States and the American Center for Law and Justice express the correct view that a ruling striking RFRA on Establishment Clause entanglement grounds *could* invalidate certain state laws that have instituted strict scrutiny in the free exercise context. Resp't United States Br. at 40-41; American Center Br. at 3-4.

granted; and . . . would afford a colorable pretext to claim more than were granted."); Geoffrey Seed, *James Wilson* 102 (1978) (discussing Wilson's view that anything accidentally omitted from a bill of rights would be presumed to be given to government). Two of the leading architects of the structure of the Constitution, Alexander Hamilton and James Wilson, were ardent on this point. *The Federalist* No. 84 at 513 (Hamilton). James Madison, who ultimately drafted the First Amendment, only agreed to do so in the face of enormous political pressure that threatened to undermine ratification of the main body of the Constitution. *See* Adrienne Koch, *Madison's "Advice to My Country"* 29 (1966) (stating that "the extent and vociferousness of the demands for a bill of rights throughout the country" impressed Madison); *see also* James Madison, 2 *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 556 (Gaillard Hunt and James Brown Scott eds., 1987) (remarks of Colonel Mason) (asserting that a "Bill of Rights . . . would give great quiet to the people"). The Religious Freedom Restoration Act would have been unthinkable to the Framers.

As to the twists and turns of the Fourteenth Amendment's history, *see Brown v. Board of Education of Topeka*, 347 U.S. 483, 489 (1954), what is most notable is what is lacking. It is always difficult to prove the absence of a historical fact, especially in the context of a complicated historical record, but the truth is that there is simply no support in history for the proposition that the Fourteenth Amendment was intended to permit Congress the power: (1) to overrule Supreme Court decisions interpreting the Constitution; (2) to pick and choose between Supreme Court precedents; (3) to create constitutional rights by amending the Constitution in the absence of ratification; or (4) to impose mere policy judgments on the States in violation of their sovereign authority. Whatever the history says on other scores, the Fourteenth Amendment did not make Congress an appellate court, did not amend the Constitution's ratification procedures, and did not make the States servants of Congress's policy whims.

CONCLUSION

This Court should declare the Religious Freedom Restoration Act unconstitutional, reverse the judgment below, and remand the case to the district court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 26 1996
CLERK

(10)

No. 95-2074

In The
Supreme Court Of The United States

October Term, 1996

City of Boerne,
Petitioner,

v.

P.F. Flores, Archbishop of San Antonio, and
the United States,
Respondents.

On Writ Of Certiorari to the
United States Court of Appeals for The Fifth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

The intent of this brief is less to persuade than to illumine; less to argue than to display. Its purpose is narrow: (1) to shed light on the significance of the words **religion** and **conscience** used by the First Congress and (2) to demonstrate how they were understood by those in the states legislatures that ratified. The approach is, in large part, linguistic. It involves digging out the seventeenth and eighteenth century use of words so that we can read them in the idiom of the era when the amendment was adopted.

The only question here addressed is the third that was put in the order granting certiorari, viz. "Did Congress violate Establishment Clause of First Amendment by broadly and exclusively privileging **religion** over other expressions of **conscience**?"

This amicus has for many decades been actively concerned in combined matters of religion, the church, linguistics, and the history of the Constitution. As his contribution to the Bicentennial Year, in 1991 he published "The Language of the Constitution, a Sourcebook and Guide to the Ideas, Terms, and Vocabulary Used by the Framers of the United States Constitution" (foreword by Chief Justice Warren E. Burger) (Greenwood Press, Westport, CT. In print.). This brief is filed pro bono publico for the purpose of defending the Constitution against a flank attack.

SUMMARY OF ARGUMENT

William Blackstone's "Commentaries on the Laws of England" were published some twenty years before adoption of the Bill of Rights. In discussing statutory explication, he observed:

> Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. (Vol. I, page 59)

Examination of the records, and of the linguistic authorization of the day, reveal how "religion" and "conscience" were separated.

The pre-consitution organic laws of most of the several states coupled rights of religion and of conscience with a single yoke. The Bill of Rights changed that. "Conscience" was excised.

In the first congress, the House of representatives initially proposed that rights of **conscience** be protected along with those of **religion**. But the Senate would not agree, and the House receded.[1] Four or five generations had passed since the charters of Charles II to Carolina and Rhode Island had coupled **religion** and **conscience**; the yoke broke in August of 1791 when the House agreed with the Senate to drop "conscience" for reasons unknown. Vagueness in the meaning of the word might have been reason enough. But freedom of "conscience," desirable or not, is not constitutionally protected.

ARGUMENT

What does the term "exercise of religion" mean as used in the statute? As stated in the Code, chapter 21B, section 2000bb-2(4) it means the same

[1] Documentary History of the First Congress of the United States Congress, Senate Legislative Journal, Johns Hopkins University Press, 1972, pages 136 and 189. Details follow under "The First Congress," page 20.

as in the First Amendment. Thus we must go back to find out how "religion" was understood by those in the first congress and in the state ratifying conventions when the Bill of Rights was ratified in 1791. Today's technology furnishes us better insight than we have had before, with promise of more accurate perspective and sharper focus.

1. Lexicological Background

Several publications contemporaneous with the late eighteenth century are helpful in understanding the meanings of "religion" and "conscience" as used at that time. To these definitions, "church" has been added because of its close relationship to religion. Also, frequent confusion seems to result from popular but misleading metaphors such as "church and state." Although sometimes used in debates, "church" nowhere appears in the Constitution.

The Encyclopedia Britannica, or a Dictionary of Arts and Sciences, published in Scotland in 1771, has a fourteen-page (533 through 546) article in Volume III entitled "Religion, or Theology." (The two were equated. On page 895, the entry for Theology says merely "See RELIGION.") The subject is defined thus in the first paragraph: [Modern "s" has been substituted for old-fashioned "f" in the original text.]

> I. To know God, and to render him a reasonable service, are the two principal objects of religion. We know but little of the nature of bodies; we discover some of their properties, as motion, figure, colours &c. but of their essence we are ignorant: we know still much less of the

soul; but of the essence or nature of God, we know nothing: it is the prerogative of the Supreme Being alone to comprehend his own essence: all the efforts that we can make to attain that knowledge, are arrogant and ineffectual; it is foreign to the nature of a limited spirit: but our destiny is that of a man, and our desires are those of a God. In a word, man appears to be formed to adore, but not to comprehend, the Supreme Being.

Samuel Johnson in his 1773 Dictionary says only this:

Religion

1. Virtue, as founded upon reverence of God, and expectation of future rewards and punishments.

2. A system of divine faith and worship as opposite to others.

Noah Webster, in his 1828 dictionary, says:

RELIGION, n. [This word seems originally to have signified an oath or vow to the gods, or the obligation of such an oath or vow, which was held very sacred by the Romans.]

1. Religion, in its most comprehensive sense, includes a belief in the being and perfections of God, in the revelation of his will to man, in man's obligation to obey his commands, in a state of reward and punishment, and in man's accountableness to God; and also true godliness or

piety of life, with the practice of all moral duties. It therefore comprehends theology, as a system of doctrines or principles, as well as practical piety; for the practice of moral duties without a belief in a divine lawgiver, and without reference to his will or commands, is not religion.

2. *Religion*, as distinct from *theology*, is godliness or real piety in practice, consisting in the performance of all known duties to God and our fellow men, in obedience to divine command, or from love to God and his law. James i.

Religion will attend you–as a pleasant and useful companion, in every proper place and every temperate occupation of life. *Buckminster.*

3. *Religion*, as distinct from *virtue*, or *morality*, consists in the performance of the duties we owe directly to God, from a principle of obedience to his will. Hence we often speak of *religion* and *virtue*. as different branches of one system, or the duties of the first and second tables of the law.

Let us with caution indulge the supposition, that morality can be maintained without *religion*. *Washington.*

4. Any system of faith and worship. In this sense, religion comprehends the belief and worship of pagans and Mohammedans, as well as of christians; any religion consisting in the belief of a

superior power or powers governing the world, and in the worship of such power or powers. Thus we speak of the *religion* of the Turks, of the Hindoos, of the Indians, &c. as well as of the christian *religion*. We speak of *false religion*, as well as of *true religion*.

5. The rites of religion; in the plural.
Milton

Conscience is defined thus by Noah Webster (op. cit.):

CONSCIENCE, n.
1. Internal or self-knowledge, or judgment of right and wrong; or the faculty, power or principle within us, which decides on the lawfulness or unlawfulness of our own actions and affections, and instantly approves or condemns them.

Conscience is called by some writers the *moral sense*, and considered as an original faculty of our nature. Others question the propriety of considering conscience as a distinct faculty or principle. They consider it rather as the general principle of moral approbation or disapprobation, applied to one's own conduct and affections; alledging that our notions of right and wrong are not to be deduced from a single principle or faculty, but from various powers of the understanding and will.
Encyc. Hucheson. Reid. Edin. Encyc.

Being convicted by their own *conscience*, they went out one by one. John viii.

The *conscience* manifests itself in the feeling of obligation we experience, which precedes, attends and follows our actions. *E.T. Fitch.*

Conscience is first occupied in ascertaining our duty, before we proceed to action; then in judging of our actions when performed. *J.M. Mason*

2. The estimate or determination of conscience; justice; honesty.

What you require cannot, in *conscience* be deferred. *Milton.*

3. Real sentiment; private thoughts; truth; as, do you in *conscience* believe the story?

4. Consciousness; knowledge of our own actions or thoughts.

The sweetest cordial we receive at last,
Is *conscience* of our virtuous actions past. *Denham.*

[This primary sense of the word is nearly, perhaps wholly obsolete.]

5. Knowledge of the actions of others.
B. Jonson.

6. In *ludicrous language*, reason or reasonableness.

Half a dozen fools are, in all *conscience*, as many as you should require. *Swift.*

To make conscience or *a matter of conscience*, is to act according to the dictates of conscience, or to scruple to act contrary to its dictates. *Locke. Court of conscience,* a court established for the recovery of small debts in London and other trading cities and districts.

Blackstone.

Church is defined thus by Noah Webster (op. cit.):

CHURCH, n.

1. A house consecrated to the worship of God, among christians; the Lord's house.

2. The collective body of christians, or of those who profess to believe in Christ, and acknowledge him to be the Savior of mankind. In this sense, the church is sometimes called the *Catholic* or *Universal Church.* *Johnson. Encyc.*

3. A particular number of christians, united under one form of ecclesiastical government, in one creed, and using the same ritual and ceremonies; as the English *church*; the Gallican *church;* the Presbyterian *church;* the Romish *church;* the Greek *church.*

4. The followers of Christ in a particular city or province; as the *church* of Ephesus, or of Antioch.

5. The disciples of Christ assembled for worship in a particular place, as in a private house. Col. iv. [See No. 9.]
6. The worshipers of Jehovah or the true God, before the advent of Christ; as the Jewish *church*.

7. The body of clergy, or ecclesiastics, in distinction from the laity. Hence, ecclesiastical authority. *Encyc.*

8. An assembly of sacred rulers convened in Christ's name to execute his laws. *Cruden. Brown.*

9. The collective body of christians, who have made a public profession of the christian religion, and who are united under the same pastor; in distinction from those who belong to the same parish, or ecclesiastical society, but have made no profession of their faith.

2. Organic Laws[2]

RFRA §200 bb-2 reads: As used in this chapter (4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

[2] Reference to Thurston Greene, The Language of the Constitution, A Sourcebook and Guide to the Ideas, Terms, and Vocabulary Used by the Framers of the United States Constitution. See page 1 hereof, third paragraph. Pages 666 through 687.* References therein to "Thorpe" are to Francis Newton Thorpe, The Federal & State Constitutions, Colonial Charters, & Other Organic Laws. . ., 7 volumes (House Document No. 357, U.S. Government Printing Office: Washington, D.C.) (1909-1911). Page numbers are continuous throughout the seven volumes.

There follows a step-by-step review of the organic laws of the colonies, showing that "conscience" was much in the minds of the pre-constitution founders. The word was surely well known to members of the First Congress.

Charles II, Charter of Rhode Island, July 8 1663:

> . . . that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and **consciences**, in matters of **religious** concernments, throughout the tract of lande hereafter mentioned. . .
> [Thorpe 3213]

Charles II, Charter of Carolina, June 30,1665:

> And that no person or persons unto whom such liberty shall be given, shall be any way molested, punished, disquieted, or called in question, for any differences in opinion, or practice in matters of **religious** concernments, who do not actually disturb the civil peace of the province, county or colony, that they shall make their abode in: But all and every such person and persons may, from time to time, and at all times, freely and quietly have and enjoy his and their judgments and **consciences**, in matters of **religion**, throughout all the said province or colony they behaving themselves peaceably, and not using this liberty to licentiousness, nor to the

civil injury, or outward disturbance of others: .... [Thorpe 2771]

Pennsylvania Constitution, September 2, 1790:

> [Article IX, Section 3:] That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own **consciences**; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of **conscience**; and that no preference shall ever by given, by law, to any **religious** establishments or modes of worship. [Thorpe 3100]

Fundamental Constitutions of West New Jersey, 1676:

> [Chapter 16:] That no men, nor number of men upon earth, hath power or authority to rule over men's **consciences** in **religious** matters, therefore it is consented, agreed and ordained, that no person or persons whatsoever within the said Province, at any time or times hereafter, shall be any ways upon any pretence whatsoever, called in question, or the least punished or hurt, either in person, estate, or priviledge, for the sake of his opinion, judgment, faith or worship towards God

in matters of **religion**. But that all and every such person, and persons, may from time to time, and at all times, freely and fully have, and enjoy his and their judgments, and the *exercises* of their **consciences** in matters of **religious** worship throughout all the said Province. [Thorpe 2549]

Carolina Proprietors, Declaration and Proposals, August 25, 1663:

> [Article 5:] We will grant, in as ample manner as the undertakers shall desire, freedom and liberty of **conscience** in all **religious** or spiritual things, and to be kept inviolably with them, we having power in our charter to do so.
>
> [Thorpe 2755]

New Jersey Proprietors, Concession and Agreement, February 10, 1664:

> That no person qualified as aforesaid within the said Province, at any time shall be any ways molested, punished, disquieted or called in question for any difference in opinion or practice in matter of **religious** concernments, who do not actually disturb the civil peace of the said Province; but that all and every such person and persons may from time to time, and at all times, freely and fully have and enjoy his and their judgments and **consciences** in matters of **religion** throughout the said province they behaving themselves peaceably and

quietly, and not using this **liberty** to licentiousness, nor to the civil injury or outward disturbance of others . . .

[Thorpe 2537]

Charles II, Commission Constituting a President and Council for New Hampshire, September 18, 1680:

> . . . And above all things we do by these prsents will, require & comand Our said Councell to take all possible care for ye discountenancing of vice, & incouraging of vertue & good living; that by such examples ye infidel may be invited & desire to partake of ye Christian **Religion**, & for ye greater ease & satisfacc'on of our sd loving subjects in matters of **Religion** We do hereby will, require & com'and yt liberty of **conscience** shall be allowed unto all protestants; & yt such especially as shall be conformable to ye rites of ye Church or Engld shall be particularly countenanced & incouraged. . . .
>
> [Thorpe 2448]

Fundamental Constitutions of East New Jersey, 1683:

> [Article 16:] All persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and hold themselves obliged in **conscience** to live peaceably and quietly in a civil society, shall in no way be molested or prejudged for their **religious** persuasions

and exercise in matters of faith and worship; nor shall they be compelled to frequent and maintain any **religious** worship, place or ministry whatsoever:
[Thorpe 2579-80]

William and Mary, Charter of Massachusetts Bay, October 7, 1691:

> . . . and to dispose of matters and things whereby our Subjects inhabitants of our said Province may be **Religiously** peaceably and Civilly Governed Protected and Defended soe as their good life and orderly Conversation may win the Indians Natives of the Country to the knowledge and obedience of the onely true God and Saviour of Mankinde and the Christian Faith which his Royall Majestie our Royall Grandfather king Charles the first in his said Letters Patents declared was his Royall Intentions And the Adventurers **free** Possession to be the Princepall end of the said Plantation And for the better secureing and maintaining Liberty of **Conscience** hereby granted to all persons at any time being and resideing within our said Province or Territory as aforesaid . . . [Thorpe 1882-83]

William Penn, Charter of Privileges for Pennsylvania and Delaware, October 28, 1701:

> [Article 1:] Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged

of the Freedom of their **Consciences,** as to their **Religious** Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting in this province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their **conscientious** Persuasion or Practice, nor be compelled to frequent or maintain any **religious** Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their **religious** Persuasion.

[Thorpe 3077]

George II, Charter of Georgia, June 9, 1732:

. . . And for the greater ease and encouragement of our loving subjects and such others as shall come to inhabit in our said colony, we do by these presents, for us, our heirs and successors, grant, establish and ordain, that forever hereafter, there shall be a liberty of **conscience** allowed in the worship of God, to all persons inhabiting,

or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of their **religion**, so they be contented with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government.... [Thorpe 7731]

Virginia Bill of Rights, June 12, 1776:

[Section 16:] That **religion**, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of **religion**, according to the dictates of **conscience**; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other. [Thorpe 3814]

Pennsylvania Constitution, September 28, 1776:

[Declaration of Rights, Article 2:] That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own **consciences** and understanding: And that no man ought or of right can be compelled to attend any **religious** worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the

being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his **religious** sentiments or peculiar mode of **religious** worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of **conscience** in the free exercise of **religious** worship.

[Thorpe 3082]

New York Constitution, April 20, 1777:

[Article 38:] ...this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of **religious** profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: Provided, That the liberty of **conscience,** hereby granted, shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this State. [Thorpe 2636-37]

Vermont Constitution, July 8, 1777:

[Declaration of Rights, Article 3:] That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own **consciences** and understanding, regulated by the word of God; and that no man ought, or of

right can be compelled to attend any **religious** worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his **conscience**; nor can any man who professes the protestant **religion**, be justly deprived or abridged of any civil right, as a citizen, on account of his **religious** sentiment, or peculiar mode of **religious** worship, and that no authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall, in any case interfere with, or in any manner controul, the rights of **conscience**, in the free exercise of **religious** worship; nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of **religious** worship, which to them shall seem most agreeable to the revealed will of God. [Thorpe 3740]

Massachusetts Constitution, March 2, 1780:

[Declaration of Rights, Article 2:] And no subject shall be hurt, molested or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own **conscience**; or for his **religious** profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their **religious** worship. [Thorpe 1889]

New Hampshire Constitution, June 2, 1784:

[Bill of Rights, Article 5:] Every individual has a natural and unalienable right to worship God according to the dictates of his own **conscience,** and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own **conscience**, or for his **religious** profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their **religious** worship. [Thorpe 2454]

Vermont Constitution, July 4, 1786:

[Declaration of Rights, Article 3:] That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own **consciences** and understanding, as in their opinion shall be regulated by the word of God; and that no man ought, or of right can be compelled to attend any **religious** worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his **conscience**; nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his **religious** sentiments, or peculiar mode of **religious** worship; and that no authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in

any manner control the rights of **conscience**, in the free exercise of **religious** worship: Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of **religious** worship, which to them shall seem most agreeable to the revealed will of God.
[Thorpe 3752]

South Carolina Constitution, June 3, 1790:

[Article VIII, Section 1:] The free exercise and enjoyment of **religious** profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind: Provided, That the liberty of **conscience** thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State. [Thorpe 3264]

3. The First Congress

The House of representatives on August 24, 1789 requested Senate concurrence in its amendments to the constitution proposed in fulfillment of antifederalist importunities while ratifying. Article Third (which, as modified, later became Article First) read: "Congress shall make no law establishing **Religion**, or prohibiting the free exercise thereof, nor shall the rights of **conscience** be infringed."[3]

[3] Documentary History, op.cit., page 136.

The Senate considered this resolution of the House on September 3. A motion was made to substitute: "Congress shall not make any law, infringing the rights of **conscience**, or establishing any Religious Sect or Society." The motion failed.[4]

Another motion was made that Amendment III read thus: "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of **conscience** be infringed." That motion also failed.[5]

Finally it was moved to adopt the House version conditioned upon striking: "Nor should the rights of **conscience** be infringed." This passed.[6]

On September 9, the Senate passed a motion (omitting reference to conscience) that read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion...."[7]

The House and Senate on September 22 appointed conference committees, which approved the amendment in its present form.[8] Religion had made the jump from the early organic laws right into the Constitution. Conscience made a game try, but failed. So be it.[9]

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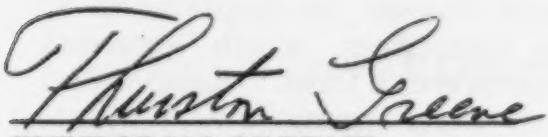
[4] id, page 151.
[5] id, page 151.
[6] id, page 151.
[7] id, page 166.
[8] id, page 168
[9] Madison may well have hoped to fight another day. He had written that: "Article V guards equally against that extreme facility which would render the Constittution too mutable, and that extreme difficulty which might perpetuate its discovered faults." The time has not passed. The Federalist No. 43, page 296. J.E. Cooke edition, Weslyan University Press, 1961, January 23, 1788.

CONCLUSION

The illumination intended by this brief might appear to favor the Archbishop as respondent. Not so. Not at the risk of warping the Constitution; lack of adequate briefing might result in a ruling that would plague generations yet unborn by adding "conscience" as a protected right. A decision for the city for the wrong reason would be a Pyrrhic victory. Whether the Fifth Circuit decision is affirmed or reversed, **conscience** is no concern of the Constitution.

The third question presented should be answered NO.

Respectfully submitted:



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November 26, 1996

No. 95-2074

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF PETITIONER

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No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES
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CITY OF BOERNE, TEXAS,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS*

The National Trust for Historic Preservation in the United States is a private, nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With the support of its 265,000 members, including more than 12,500 in Texas, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has seven regional and field offices around

the country, including one in Fort Worth, Texas.

The National Trust's expertise in historic preservation law is unparalleled; the Trust has participated in more than one hundred historic preservation cases during the past twenty-five years, including ten federal and state court cases involving the application of the First Amendment to historic religious properties. In this capacity, the National Trust is aware of a number of cases around the country in which local historic preservation ordinances have been challenged under the Religious Freedom Restoration Act.

The National Trust also contributes financial and technical assistance for the preservation of historic religious properties. This support includes providing loans and grants, conducting workshops and training programs on financial planning and property management for religious institutions, and serving as a clearinghouse for information on religious property conservation.

SUMMARY OF ARGUMENT

Petitioner, the City of Boerne, Texas ("City") has enacted an ordinance providing for the preservation of the City's architectural legacy, and regulating the circumstances under which historic structures within the City may be demolished or modified. Pursuant to that ordinance, the City denied the application of Respondent, P.F. Flores, the Archbishop of San Antonio ("Archbishop"), to demolish and reconstruct St. Peter Catholic Church ("Church"), a seventy-three-year-old historic structure located in the City's historic district. According to the Archbishop's allegations, unless the Church is demolished and reconstructed to his specifications, some parishioners may be prevented from attending Mass at the Church. The Archbishop filed this lawsuit, challenging the City's right to deny the demolition

permit, pursuant to the Religious Freedom Restoration Act ("RFRA" or "the Act"), 42 U.S.C. § 2000bb *et seq.* (1994), as well as a number of other constitutional challenges.

Congress passed RFRA in 1993 to protect the "free exercise [of religion,]" U.S. Const., amend. I, while ensuring that the everyday operations of government are not subject to strict scrutiny when they incidentally burden religious conduct. The Act was intended as a legislative response to *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), in which this Court found that neutral laws of general applicability did not prohibit the free exercise of religion under the First Amendment and therefore did not require any "compelling justification" by the government. *See* 42 U.S.C. § 2000bb(a)(4) (characterizing *Smith* as "virtually eliminat[ing] the requirement that government justify burdens on religious exercise"). RFRA expressly "restore[s]" Congress's understanding of this Court's pre-*Smith* free exercise jurisprudence, which required the government to offer a "compelling justification" in the event that governmental action imposed a "substantial burden" on religious activity. *See id.* § 2000bb(b)(1) (*citing Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

The Archbishop's RFRA claim was addressed prematurely in the courts below. The District Court found the Act unconstitutional; the Court of Appeals reversed. But neither court addressed the threshold question whether RFRA's protections are even triggered by the City's actions. The National Trust, as *amicus curiae*, urges this Court to recognize the priority of the statutory issue and either (1) vacate the opinions of the Court of Appeals and the District Court and affirm the judgment of the District Court on

different grounds, namely, that the City's actions do not trigger RFRA's "compelling interest" test, or (2) vacate the opinions of the Court of Appeals and the District Court and remand to the District Court for threshold factual determinations.

Recognizing the role of the judiciary in our constitutional system, courts will ordinarily decline to reach a constitutional issue if an antecedent, nonconstitutional basis for decision is available. This prudential rule applies irrespective of the stage of litigation or (for purposes of this Court) the issue formally contained in the petition for writ of certiorari. Thus, although neither the trial court nor the appellate court below paused to determine whether the City's action actually triggered strict scrutiny under RFRA, this Court itself should either do so now, or remand this matter to the District Court for such a determination.

RFRA applies only when government action constitutes a "substantial[] burden" on the exercise of religion. 42 U.S.C. § 2000bb-1(a). Both the Act and its legislative history direct the courts to the free exercise jurisprudence predating *Smith* for purposes of defining all terms, including the term "substantial burden." 42 U.S.C. § 2000bb(b)(1).

Under this Court's pre-*Smith* free exercise jurisprudence, governmental action imposes a "substantial" burden on religion only when it punishes religiously prescribed conduct or coerces religiously proscribed conduct. In these cases, the penalty or coercion operated on adherents individually, essentially forcing them to choose between obeying their religious precepts or facing criminal sanctions or other penalties. None of the Archbishop's allegations rise to this level. The City's denial of the Archbishop's demolition permit does not penalize any religiously motivated activity. Moreover, even if the Court assumes as

true the Archbishop's allegations that some Church members may be unable to attend Mass at the Church occasionally, that does not have the effect of penalizing or coercing individual members.

In contrast, where governmental action has marginally affected the overall level of religious activity, this Court has found the burden upon the exercise of religion to be insubstantial. For example, neutral laws making religious activity more expensive or inconvenient, or having the effect of reducing the number of adherents able to participate in religious activity, impose only incidental burdens. That is precisely the nature of the burden involved here. No individual member of the Church is being denied the ability to worship, no parishioner is subject to any penalty for worshipping as he or she wishes, and no one is being coerced in any way owing to his or her religious practices. At most, the City's action has affected the overall level of religious activity at the Church. But this incremental affect is not a "substantial burden" within the meaning of this Court's pre-*Smith* free exercise jurisprudence.

ARGUMENT

The City's effort to preserve its architectural legacy, which includes the 1923 St. Peter Catholic Church, was challenged below as a substantial burden on the exercise of religion.[1] In 1985, the City enacted a local historic preservation ordinance, which was amended in 1989 and 1991, to ensure the preservation of "structures having significant historical value which reflect the heritage of the

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[1]For purposes of this summary, the National Trust has relied on the Second Amended Complaint (cited as "Compl."), and a joint stipulation of the parties (styled Exhibit 5-PTO, Stipulated Facts, and cited as "Stip.").

City, the State [of Texas], and its people." City of Boerne Ordinance No. 91-05 at 1 (June 25, 1991) ("Ordinance"). Until October 1994, the boundary of the historic district created pursuant to the Ordinance bisected the Church. Compl., ¶ 11; *see generally* Ordinance, § 6 (providing for the creation of the historic district).[2]

In 1993, the Archbishop sought permission from the Landmark Commission to demolish most of the Church and to build a larger structure in its place. The demolition and reconstruction of the Church is intended to enlarge the building to accommodate more worshippers. Compl., ¶¶ 9, 13.

After reviewing the Archbishop's proposals for demolition and renovation, the City's Landmark Commission denied -- pending "changes to the permit application" -- the Archbishop's application in February 1994, because the demolition would "adversely affect the historic district" and would be "inconsistent with the spirit and purposes" of the Ordinance. Stip., ¶ v. The Archbishop's appeal of the Landmark Commission's decision to the City Council was also denied. *Id.*, ¶ y. The Archbishop does not appear to contend that the City did not follow its established procedures in reviewing the applications. *See generally* Ordinance, § 7.1.1 (setting out criteria for reviewing demolition and reconstruction applications).

Following denial of the Archbishop's application and appeal, the Landmark Commission offered to "work with" the Archbishop to facilitate construction of a new structure in the historic district, and the parties met to consider

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[2]Since October 1994, the entire Church has been within the boundaries of the historic district.

alternative designs and locations. Stip., ¶¶ bb, mm. Indeed, the City Council even enacted a nonbinding resolution in January 1995 endorsing the closure of a portion of an adjacent street to "facilitate the construction of a new church building, without destruction of the 1923 church structure." *Id.*, ¶ ii.

In spite of these efforts to reach an accommodation, the Archbishop filed the present lawsuit in May 1994. The Archbishop alleges, among other things, that the City's denial of the demolition application "imposes a significant burden on the free exercise of religion" and that the City's decision is a violation of RFRA. Compl., ¶ 29.

Although the Archbishop appears to contend that any alternative to the proposed demolition will inevitably prevent some members of the Church from attending Mass at St. Peter on occasion, *see id.*, ¶¶ 25, 29, the Archbishop also appears to concede that the interests of the Church and the City can both be accommodated, albeit by a more expensive renovation. *See, e.g., id.*, ¶ 23 ("An alternative design that recognizes the constraints of the terrain and pays due regard to the liturgical aspects of the Church would cost substantially more than the proposals already submitted"); *see also* ¶¶ 19, 27. Moreover, the courts below paid no attention to a variety of alternatives for accommodating the interests of all parties, including the holding of additional Masses, or the use of additional, existing sites.

The District Court ordered briefing on the constitutionality of RFRA and decided that RFRA was unconstitutional without finding any facts or making any determination as to whether the provisions of RFRA were triggered by the City's actions here. *Flores v. City of Boerne*, No. SA-94-CA-0421 (W.D. Tex. March 15, 1995) (Bunton, J.), *reprinted at* Petition For A Writ Of Certiorari,

Appendix B. On interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), the United States Court of Appeals for the Fifth Circuit reversed, again without expressly determining whether RFRA was applicable. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996). This Court then granted a writ of certiorari.

I. THE ISSUE WHETHER THE RELIGIOUS FREEDOM RESTORATION ACT IS TRIGGERED BY THE CITY'S ACTION SHOULD BE RESOLVED BEFORE ADDRESSING THE ACT'S CONSTITUTIONALITY.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Servs. v. McLaughlin*, 323 U.S. 101, 105 (1945); *see generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-47 (1936) (Brandeis, J., concurring). This doctrine requires that, prior to declaring RFRA unconstitutional, a court should determine whether the Act is properly invoked by the litigant seeking the law's protection.

This prudential rule applies to all cases at all stages of litigation, including cases ostensibly presenting only constitutional issues. Accordingly, this Court has not hesitated to look beyond any formally presented constitutional issue for nonconstitutional grounds for decision when these principles would be served. As then-Justice Rehnquist explained in *Loper v. Beto*:

> It is true that our grant of certiorari in this case was limited to the [constitutional] question that is decided by the plurality in today's opinion. But the limited nature of the grant is not an advance

> guarantee that after reading briefs and hearing oral argument, we will be satisfied that the question is properly presented to us. Our duty to avoid constitutional adjudication when narrower grounds of decision are possible is clearly established by such authority as *Ashwander* . . . and *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

405 U.S. 473, 502 (1972) (Rehnquist, J., dissenting).[3]

Earlier in the same term, this Court granted certiorari in *United States v. Campos-Serrano* on a constitutional issue (involving the Sixth Amendment) and a statutory one (involving immigration laws). 404 U.S. 293, 302 n.1 (1971) (Blackmun, J., dissenting) (setting out questions in certiorari petition). Following briefing, however, this Court, citing *Ashwander*, decided the case on an entirely different statutory ground that dispensed with the need to reach the constitutional issue. *Id.* at 295.[4] *Cf. Liverpool, N.Y. and*

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[3]The fact that this statutory issue has not been raised by the parties should not prevent the Court from considering it. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-37 (1991) (Stevens, J., dissenting) (Court may reach issue raised for the first time in *amicus* briefs); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them") (citations omitted).

[4]In *Campos-Serrano*, the Court observed in passing that the ground on which it ultimately decided the case had been before the lower court. 404 U.S. at 296 n.4. The same is true here: the National Trust argued in the Fifth Circuit that unresolved statutory

Phila. Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (declining to address constitutional issue decided below; remanding for determination of statutory issues).

Addressing the constitutionality of RFRA is a wholly unnecessary exercise here. RFRA only applies where a government's action "substantially burdens" religious conduct within the meaning of this Court's free exercise cases prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1). But those cases counsel serious reservations about the applicability of RFRA here: even if all of the Archbishop's allegations in the record are taken as true, preservation of the Church is simply not a "substantial burden" on the practice of religion by the Church's members.

Consistent with the prudential rule against deciding constitutional issues unnecessarily, the National Trust urges resolution of the antecedent statutory issue, namely, the applicability of RFRA. As explained *infra,* the City's actions do not constitute a "substantial burden" on the exercise of religion by the Church's members and thus do not trigger the "compelling interest" showing required by RFRA. Accordingly, this Court should either (1) vacate the opinions of the Fifth Circuit and the District Court and affirm the dismissal of the Archbishop's RFRA claim on different grounds or (2) in the event the Court believes that the record of the Archbishop's allegations does not afford an

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issues were precedent to the Archbishop's constitutional claim. *See* Brief *Amicus Curiae* Of The National Trust For Historic Preservation at 3, *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996). *See also* Brief Of The United States In Opposition at 10-11.

adequate basis for dismissal, vacate and remand to the District Court for factual findings on RFRA's requirements.

II. THE CITY'S DENIAL OF A DEMOLITION PERMIT IS NOT A "SUBSTANTIAL BURDEN" ON THE FREE EXERCISE OF RELIGION.

A. RFRA Does Not Apply Where Governmental Action Does Not Substantially Burden Religious Conduct.

While RFRA is intended to prevent government from substantially burdening religious exercise without compelling justification, it is not intended to exempt from all secular authority anything and everything remotely connected to religion. Rather, the Act ensures religious freedom while explicitly recognizing, through its "substantial burden" requirement, that incidental burdens on religion inevitably arise in a democratic system of laws, and that governments cannot and need not prove "compelling" justifications for those merely incidental burdens.

Congress did not adopt the "substantial burden" threshold by accident. Indeed, the original version of RFRA in the House of Representatives covered *all* "burdens" on religion. *See* H.R. Rep. No. 103-88 at 10 (1993). So sweeping an act would, of course, have had profoundly debilitating effects at every level of government in the United States. Accordingly, the Senate purposefully amended the House version to address only "substantial" burdens, as Senator Hatch explained:

> [T]he amendment . . . is intended to clarify [that] the compelling interest required by the Religious Freedom Act applies only where there is a *substantial burden* placed on the individual free exercise of religion.

> This is consistent with the case law developed by the Court prior to the Smith decision . . . .
>
> [The Act] does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest set forth in the Religious Freedom Restoration Act.

139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (remarks of Sen. Hatch) (emphasis supplied); *see also id.* (remarks of Sen. Kennedy) ("The act would not require [a compelling interest] justification for every governmental actions [sic] that have an incidental effect on religious institutions."). The House accepted the Senate amendment, and specifically noted: "This amendment is consistent with the intent of the bill, and prior case law, which does not protect persons against State actions which have only an *incidental* burden on their religious exercise." 139 Cong. Rec. H8714 (daily ed. Nov. 3, 1993) (remarks of Rep. Brooks) (emphasis supplied).

Congress's intention to codify this Court's pre-*Smith* threshold test requiring demonstration of a "substantial burden" is contained in the statute itself: "The purposes of this [Act] are (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is *substantially* burdened." 42 U.S.C. § 2000bb(b) (emphasis supplied).

This express legislative intention is consistent with the Court's own rule that, when the legislature borrows a judicial term of art, the legislature intended it to have its

established meaning. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *see Morisette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached [thereto]"). Thus, if the federal courts would not find a violation of the free exercise clause under pre-*Smith* jurisprudence, then they would not find a violation of RFRA.

B. The City's Denial Of A Demolition Permit For The Church Is Not A "Substantial Burden" On Religious Conduct.

Using the pre-*Smith* test required by RFRA, this Court has rarely found a burden on religious conduct unconstitutional. Frequently, the Court has found that government action imposes only an insubstantial burden on free exercise. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-05 (1985) (requirements of Fair Labor Standards Act as applied to religious group do not require compelling justification). Applying those cases to the Archbishop's allegations demonstrates that the Archbishop's RFRA claim should be dismissed.

The Archbishop has explained the burden on religious activity involved here largely in terms of the ability of parishioners to attend Sunday Mass. Compl., ¶¶ 25, 29.[5]

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[5]For purposes of addressing the Archbishop's allegation that the City's action "substantially burdens" religion, the National Trust has taken as true the allegations in the Second Amended Complaint because the Archbishop's RFRA claim was disposed of on the pleadings. *See Leatherman v. Parrant Cty. Narcotics Intel. and Coord. Unit*, 507 U.S. 163, 164 (1993) (on motion to

Essentially, the Archbishop contends that the Church must be demolished and rebuilt in precisely the way he wishes; any alternative entails either excluding some members of the church from Mass or spending additional Church funds. *Id.*, ¶¶ 23, 27, 29. Even if taken as true, this view of the facts does not describe a "substantial burden" on religious conduct, and therefore does not implicate RFRA in this case.

Government imposes a "substantial" burden on religious conduct when it punishes religiously prescribed conduct or coerces religiously proscribed conduct, whether through the criminal laws or through withholding of otherwise available government benefits. In *Wisconsin v. Yoder*, which RFRA explicitly invokes, *see* 42 U.S.C. § 2000bb(b)(1), this Court examined Wisconsin's compulsory attendance law, which subjected the parents of nonattending children to criminal sanctions. The Old Order Amish challenged the law on the ground that forced high school attendance jeopardized their religious observance. After calibrating the "worldly influence" of the modern public high school on the traditionalist precepts of the Old Order Amish, this Court agreed: "secondary schooling . . . contravenes the basic religious tenets and practices of the Amish faith," and indeed, constitutes "a very real threat of undermining the Amish community and religious practice." 406 U.S. at 218. Because the law effectively punished the religionist for practicing religion, the burden was substantial.

Both before and after deciding *Yoder*, this Court has taken a similarly strict view of the "substantial burden" requirement. In *Sherbert v. Verner*, for example, South Carolina denied unemployment benefits to a Seventh-Day

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dismiss, all factual allegations in the complaint are assumed to be true).

Adventist because she refused to work on her Sabbath. This Court wrote: "[the] imposition of such a choice puts the same kind of burden upon free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404.

Finally, the facts of *Smith* itself provide a textbook example of a case in the *Yoder* line. There, the burden could hardly have been greater: Oregon's unquestionably neutral law prohibiting peyote criminalized a sacrament of the Native American Church. *Smith*, 494 U.S. at 874. Accordingly, Justice O'Connor (applying the pre-*Smith* test codified by RFRA)[6] found Oregon's peyote laws sustainable only on a showing of compelling interest, and found that Oregon had a "compelling interest" in prohibiting possession of peyote. *Id.* at 903-06 (O'Connor, J., concurring).

In all of these cases, the government confronted the adherent with an intolerable dilemma: abandon your religious practice or be punished. This was so whether the law provided criminal penalties for religious conduct (*Yoder*, *Smith*), or exclusion from universally available subsistence programs, which was the equivalent of a criminal penalty (*Sherbert*). In addition, the burdens deemed "substantial" by the Court operated on every adherent individually. Before *Yoder*, every Old Order Amish parent was subject to criminal penalties for her child's inattendance. Before *Sherbert*, every Seventh-Day Adventist who refused to work on Saturday was denied unemployment benefits. And in Oregon, every Native American Church adherent was barred

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[6]Both Congressional reports quoted extensively and approvingly from the concurrence in *Smith*, in which Justice O'Connor applied the traditional "substantial burden" analysis. *See, e.g.*, S. Rep. No. 103-111 at 1896 (1993).

from engaging in his church's sacraments. The government action burdened the religious conduct of each and every adherent within the law's purview, and accordingly, the Court found the burden to be "substantial."

This universe of "substantial burdens" on religion does not encompass the Archbishop's allegations. The City's denial of the demolition permit does not punish the practice of religion, or coerce its rejection, or operate on any religionist individually. The City has denied the Archbishop the right to demolish an historic church for reasons having nothing to do with religious conduct.[7] And indeed, some Church members may thereby be unable to attend Mass on occasion. But the Archbishop cannot show that this would result from a penalty on attending, or from a need to forego Mass to receive a vital government benefit. At bottom, the City's action does not penalize -- directly, indirectly, or any other way -- the practice of religion, and so is a far cry from the burdens on religious conduct found in *Yoder*, *Sherbert*, and similar cases.

Where, in contrast, government has only marginally affected the overall level of religious activity, this Court has

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[7]All religious institutions engage in essentially secular activity, such as managing their records or their property in compliance with the law, in furtherance of their religious mission; moreover, these secular activities necessarily have religious overtones. But such compliance is not therefore a "substantial burden" on free exercise. *See, e.g., Tony & Susan Alamo Found.*, 471 U.S. 290 (even though compliance with mandates of the Fair Labor Practices Act violated adherents' religious beliefs, the Court found no "substantial burden" on free exercise). Accordingly, the City's preservation laws as applied to Church property do not impose a "substantial burden" merely because management of the property has religious implications.

found the burden on free exercise to be insubstantial. In *Jimmy Swaggart Ministries v. Board of Equalization*, the Court reviewed the burden that California's Sales and Use Tax imposed on the Ministries' activities, which included the purveyance of the instruments of worship -- Bibles, Bible study manuals, tapes of sermons, and religious music. The tax did not criminalize any religious conduct, but it had the necessary effect of "decreas[ing] the amount of money appellant ha[d] to spend on its religious activities." 493 U.S. 378, 391 (1990). Less money meant, inevitably, fewer "evangelistic crusades [and] missionary endeavors," *id.* at 381-82; in other words, fewer adherents participating in the religious activity of the Ministries.

The Ministries could, of course, have elected to raise prices to recover any revenue lost to the tax. But the effect, for First Amendment purposes, would have been exactly the same: fewer adherents would have been able to afford Bibles and other religious publications and materials, and accordingly, fewer would have been able to engage in religious activities. Thus, without specifically prohibiting any individual adherent from engaging in religious conduct, California's tax had the effect of diminishing the total amount of observance within a religious community. *See also Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (neutral tax law that diminishes adherents' ability to engage in religious activity does not impose a substantial burden).

The City's limitations on the demolition of buildings within the historic district impose an incidental burden on the Church no greater than those identified in *Swaggart* and *Hernandez*. Essentially, the Archbishop's position is that demolition and reconstruction of the Church will maximize the opportunities for the Church members to worship. But there is nothing in pre-*Smith* free exercise jurisprudence that

imposes an obligation on the City to assist in this project. And even if, on any given Sunday, fewer worshippers may attend Mass in the existing Church than in a larger building, that is precisely the type of concern with the overall level of religious activity that *Swaggart* and *Hernandez* rejected.

In *Hernandez*, Scientologists who were required by their religion to pay for "auditing" sessions were denied a tax deduction for the sessions. This Court's upholding of the denial inevitably diminished religious activity in two ways: first, by making worship more expensive for all adherents, and second, by making some religious activity impossible for those adherents who simply could not, without the deduction, afford the sessions. Similarly, the City's decision here could require those who wish to attend Mass at the Church to arrive earlier, and could also mean that some members may be unable to attend Mass at this Church. Under this Court's decisions prior to *Smith*, however, that is not a substantial burden on free exercise.[8]

In *Rectors, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 449 U.S. 905 (1991), the U.S. Court of Appeals for the Second Circuit applied *Swaggart* and *Hernandez* to a dispute similar to the one before this Court. St. Bartholomew's Church owned a Community House in which the Church conducted many of its religious and community outreach activities. New York's Landmarks Preservation Commission denied the Church's request to level the historic Community House and replace it with an

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[8]The inability of a Scientologist to pay for "auditing" sessions, *see Hernandez*, 490 U.S. at 699, is weighed, in the First Amendment balance, no differently than the inability of a Catholic to attend a Mass of her choosing.

office tower, which would both house the Church's religious activities and significantly enhance the Church's revenues through commercial rents. *St. Bartholomew's*, 914 F.2d at 352, 355.

Citing *Swaggart* and *Hernandez*, the Second Circuit found that whether the Church's religious activity was "substantially burdened" by New York's action turned on whether the Church "ha[d] been denied the ability to practice [its] religion or coerced in the nature of those practices." *Id.* at 355. The Second Circuit found that New York's action, like the City's in this case, did not punish any religious activity. In each case, religious activity may have been rendered more expensive or less convenient, but that, again, is an incidental burden not requiring a compelling justification.

The Archbishop has alleged that the effect of the City's action may deprive some members of the church of the ability to attend Mass on occasion. But the Archbishop has also suggested that the Church's interests and the City's Ordinance can both be accommodated, merely by using an alternative -- although more expensive -- design. *See* Compl., ¶¶ 19, 23, 27. Moreover, the interests of all parties may be served by the holding of additional services, either at the Church or at alternative venues.

If, as these alternatives suggest, the issue here is merely one of expense, then the Archbishop's case for a "substantial burden" is slender indeed. Where the law "operates so as to make the practice of . . . religious beliefs more expensive," no compelling justification is required. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1960) (upholding Sunday closing laws despite free exercise claims by Orthodox Jews). This version of the Archbishop's argument was properly analyzed by the Sixth Circuit in *Lakewood*,

Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983). There, the congregation contested the city's comprehensive zoning plan because it barred construction of a house of worship on land owned by the Congregation; the permissible sites were all "more expensive." *Id.* at 307. The Sixth Circuit, citing *Braunfeld*, found government action that raised the cost of engaging in religious activity, including the cost of constructing a house of worship, is not a "substantial" burden within the meaning of this Court's free exercise jurisprudence. *Id.* at 307-08. If this greater expense (as opposed to the potential exclusion of Church members from Mass) is, in fact, the burden involved here, there is no question that the City's actions do not trigger the "compelling interest" requirement of RFRA.

CONCLUSION

For the foregoing reasons, the National Trust urges this Court to vacate the opinions of the Court of Appeals and the District Court and affirm the judgment of the District Court on statutory grounds, or, in the alternative, to vacate the opinions of the Court of Appeals and the District Court and remand to the District Court for findings of fact on the applicability of the Religious Freedom Restoration Act.

Respectfully submitted,

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November 27, 1996

Supreme Court, U.S.
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CLERK

(12)

No. 95-2074

In the
Supreme Court of the United States
October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, Archbishop of San Antonio,

Respondent,

and

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION AND BRIEF *AMICI CURIAE* OF CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., AND AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF PETITIONER

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15 pp

MOTION OF *AMICI CURIAE* CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC. AND AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN TO FILE BRIEF IN SUPPORT OF PETITIONER

The above organizations hereby respectfully move this honorable Court for an Order permitting them to file an *amici curiae* brief in the above captioned matter. All parties have consented.

The above organizations' interest in this case is sincere. Their purpose is to protect the lives, health, and rights of children. To that end, these amici have identified infirmities in the Religious Freedom Restoration Act, 42 U.S.C. 2000bb1-4 ("RFRA"), which have the effect of subjugating the constitutional rights of non-religious persons, which has a disproportional effect on children.

For these reasons, the above organizations respectfully request this Court to issue an Order allowing them to file the attached *amici curiae* brief in this case.

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STATEMENT OF INTEREST

Founded in 1983, Children's Healthcare is a Legal Duty, Inc. ("CHILD, Inc.") is a private tax-exempt organization with about 300 members in 44 states. CHILD, Inc. promotes the rights of children to medical care and opposes religious exemptions from health care requirements for children and from statutory duties of care.

The American Professional Society on the Abuse of Children ("APSAC") is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy. The purposes of APSAC are to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals, to increase knowledge about abuse, and to improve the competence of professionals working with abused children and their families. APSAC was founded in 1987, and now has more than 5,000 members.

The interests of the amici curiae in this case arise from the indisputable fact that children are dependent on adults for the essentials of life -- including decisions about when it is appropriate to seek medical care. The amici do not contest this pivotal decision-making role for the child's family. Nor do the amici seek a legal rule in which parents' difficult decisions concerning children would be subject to second guessing by authorities whenever an outcome is undesirable. However, when adults' actions expose a child to serious physical harm or suffering and death, the adults' actions must be subject to the full range of legal remedies that would be available to any adult in the child's position. Such remedies are essential to safeguard children against the actions of individuals that manifest a willful disregard for the safety and health of children.

ARGUMENT

I. CONGRESS HAS EXCEEDED ITS POWERS UNDER ARTICLE 5 OF THE FOURTEENTH AMENDMENT BECAUSE RFRA RATCHETS DOWN DUE PROCESS AND EQUAL PROTECTION RIGHTS.

Respondent has asserted that Section 5 of the Fourteenth Amendment authorizes Congress to "expand but not contract the scope of Fourteenth Amendment liberties" (Respondent Flores' Response to Petition, at 25) under *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the so-called one-way ratchet theory. Respondent thus concedes that if the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 et seq., ("RFRA"), has the effect of violating or subjugating constitutional rights, then Congress has exceeded its authority under Article 5. Amici will show that RFRA is not a one-way ratchet at all, but rather a two-way ratchet which denies due process and equal protection of the laws to everyone who interacts with a person or religious entity who may assert the RFRA preference. In this respect, children are particularly adversely affected.

RFRA applies a strict scrutiny standard to the actions of all levels of government. 42 U.S.C. § 2000bb-1, et seq. At first glance, it may appear that only the interests or rights of government are subject to the broad sweep of RFRA. On closer examination, however, it is readily apparent that other private interests and rights, including those of children in the custody or care of religiously motivated parents or guardians, are also subjected to strict scrutiny.

In *New York Times v. Sullivan*, 376 U.S. 255 (1964) the Court held that the rules of law applied in civil actions between private parties are government action for purposes of constitutional scrutiny. Because RFRA prohibits government

from substantially burdening an exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), RFRA requires strict scrutiny to be applied in all court actions where one of the parties alleges a burden on the exercise of religion. The result is that religious standards will be applied by the courts in such cases, and an impossibly high burden of proof will be imposed on the non-religious party.

For example, in a hypothetical boundary line dispute between a church and an adjoining landowner, certainly a state court judgment decreeing that the true boundary between the properties impinged significantly on church property would be a substantial burden under RFRA. Compelling government interests are interests of the highest order, such as "national security or public safety." *In re Young*, 82 F.3d 1407, 1419 (8th Cir. 1996), *pet. for cert. filed.* The government interest in its application of neutral principles law or providing a forum for a suit between two private parties is probably not a governmental interest of the highest order and therefore not a compelling interest. The result under RFRA is that the church would be entitled to take as much of the disputed property from the adjoining landowner as is sufficient to avoid a substantial burden on it. RFRA thus destroys the adjoining landowner's Fourteenth Amendment right to his property and his right to have the dispute adjudicated under neutral principles of law in violation of due process and equal protection.

The unqualified preference for religion granted by RFRA, even in cases where the conflicting interests are not between government and religion but rather between religion and other private interests, is present in *Young, id.* In *Young,* the bankruptcy trustee administering the bankruptcy estate for the benefit of all creditors under Bankruptcy Code provisions neutral toward religion, was prohibited from recovering preferential payments made by the bankrupt to his church on

the eve of bankruptcy. The court applied RFRA and held that the recovery of the preferential payment was a substantial burden on the church and the government had no compelling interest in administering the Bankruptcy Code. Thus the rights of all non-religious creditors to a portion of the bankrupt's estate under neutral laws, were subjugated to the interests of the church, in violation of the Fourteenth Amendment's guarantee of equal protection of the laws.

In the area of child protection, at least one state court has modified the tort law negligence standard to require that the tortfeasor's religious beliefs and practices be considered by the jury. *Lundman v. McKown*, 530 N.W.2d 807 (Minn.App. 1995), *review den., cert. den.* 116 S.Ct. 814. In *Lundman*, a wrongful death tort action was brought against a Christian Scientist and her hired spiritual treatment providers for withholding medical care and allowing her 11-year-old son to die of untreated diabetes. The Minnesota Court of Appeals held that because "an individual's right to religious autonomy is a core ideal of both the state and federal constitutions ... we apply a standard of care taking account of 'good-faith Christian Scientist' beliefs rather than an unqualified 'reasonable person standard.'" *Id.*, at 827-28. Under RFRA the same result is compelled in all courts, because "the religious belief would be burdened by the [tort standard]." *Id.* at 818. The result is that the fundamental constitutional right to life of all children in the custody or care of spiritual treatment providers and the constitutional right to have their disputes adjudicated under religiously neutral principles of law guaranteed by the equal protection and due process clauses of the Fourteenth Amendment, are violated by RFRA.

Because RFRA subjugates the interests of all persons, not just those of government, to religious interests, it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and it is therefore an improper exercise of Congressional power under the ratchet theory of Article 5.

2. RFRA'S LIMITATION ON POWERS OF THE STATE TO ACCOMPLISH A LEGITIMATE STATE PURPOSE TO A SINGLE LEAST RESTRICTIVE MEANS, VIOLATES THE STATE'S RIGHTS UNDER THE TENTH AMENDMENT AND PRINCIPLES OF FEDERALISM, TO ADOPT CUMULATIVE REMEDIES IT MAY DEEM NECESSARY.

Under the federal constitution Congress is limited to its enumerated powers and the states retain their integrity of self-governance under the Tenth Amendment and the federalism principle inherent in the constitution. *New York v. United States*, 505 U.S. 144 (1992). Unless a state intrudes upon an individual right incorporated under the Fourteenth Amendment, or upon pre-emptive Congressional exercise of its powers, a state is free to accomplish its interests by any means consistent with its laws.

With these principles in mind, the states have an intense local interest as *parens patriae* in the protection of its children. The vulnerability and legal incompetence of children, as well as protection of the local fisc, underscore the compelling nature of a state's interest in enacting and enforcing laws which protect and nourish the lives and health of children.

It has long been held that indeed, a state's interest in child protection is so compelling that it does not require strict scrutiny even when the parent's right to free exercise of religion under the First Amendment is burdened. *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, the Court upheld the child labor law conviction of a guardian who had required her child to distribute religious tracts on the street against claims that such conduct was religiously required, stating:

> "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death ... Parents may be free to become martyrs themselves, but it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.*, at 167, 170.

In furtherance of this unquestioned interest in child protection, states have enacted a comprehensive scheme to deal with the problem of child endangerment, abuse, neglect, or non-support including criminal penalties, civil tort liability, mandatory reporting, and social service intervention. Because of their intense interest in the welfare of children, states have exercised their judgment that a single remedy is insufficient. This exercise of inherent state authority in an important area of local concern should not be restricted by a federal standard which confines the state to a single "least restrictive" remedy.

Yet RFRA's strict scrutiny standard does exactly that for children who are in the custody of persons whose religious beliefs or practices are contrary to commonly accepted notions of child welfare. The types of religious practices which adversely affect child welfare include reliance on spiritual means for treatment of illness which withholds needed medical care, physical punishment, abuse through exposure to dangerous animals or poison, as well as child sexual practices. The safety of children in schools has also been subjugated under RFRA. See *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

The interest of the states in the support of children is also compelling and has been addressed with a wide panoply of remedies designed to provide the fullest protection both for the individual child as well as the public fisc. The remedies enacted by the state may include a criminal penalty for non-

support, civil child support orders in both support proceedings as well as marriage dissolution, wage withholding and sequestration of property, and the enforcement of those support orders by contempt.

Again, in the case of child support, RFRA confines the state remedy to one "least restrictive means" where the refusal to pay is based upon religious belief. *Hunt v. Hunt,* 648 A.2d 843 (Vt. 1994). In *Hunt* the court held that where the non-supporting father was a member of a church which prohibited support of children who lived outside of the closed religious community, RFRA required that the state show that exercise of the contempt power was the least restrictive means, and dismissed the contempt citation, leaving the state powerless to enforce its order for support. *Id.*, at 854. Such confinement of the state's remedy did not exist prior to RFRA.

Because the interest of the states in child protection is so compelling, it is not subject to RFRA balancing under its Tenth Amendment rights and powers retained under federalism.

III. THE ENACTMENT OF RFRA HAS HAD OTHER UNINTENDED UNCONSTITUTIONAL EFFECTS.

The enactment of RFRA has had serious unintended effects on Congress and the courts.

A. RFRA Has Induced the Enactment Of Other Unconstitutional Legislation by Congress.

From 1987 to 1994 the U.S. Department of Health and Human Services (HHS) ruled some states out of compliance with Child Abuse Prevention and Treatment Act (CAPTA) grant standards because the state's laws gave exemption from a duty to report medical neglect or limited the state's ability to

investigate and order medical care when caretakers withheld medical care on religious grounds. Several churches charged that HHS's efforts were prohibited by RFRA. They claim that state intervention in child neglect does not serve a compelling federal interest and therefore RFRA prohibits the federal government from setting standards applicable to children whose parents raise religious objections to medical care. *The Christian Science Journal*, October, 1994, at 41-42.

These churches claim that prayer is "excellent health care" and that, under RFRA, the government has the burden of proving that medical care is better than prayer before it can require medical care for a sick or injured child. A special counsel for the National Council of Churches has asserted, "The government has to show that there's a compelling reason not to exempt this particular person. So it's not just the general governmental interest ... but its a compelling interest. It's a very high standard." *The Christian Science Journal*, April, 1995, at 48.

In Congressional testimony, a Christian Science spokesman charged that HHS policy under CAPTA violates RFRA: "Not only has HHS not examined the least restrictive means question, they have not proven that their actions advance or better the compelling interest of health care for children. Absolutely no evidence exists showing Christian Science care and treatment to be any less effective for the health of a child than conventional medical treatment." *Philip Davis, Statement to Subcommittee on Children and Families, U.S. Senate Labor and Human Resources Committee*, May 25, 1995.

Under this argument, RFRA requires the states to prove the ineffectiveness of prayer before it can require medical treatment for a sick child whose parents rely exclusively on spiritual treatment for healing disease. That is a virtually impossible burden to meet, and leaves children at risk of death and disability.

In response to RFRA proponents, Congress enacted in 1996 the first religious exemption in federal law from a caretaker's obligations to provide necessities of life for a child: "Nothing in this Act shall be construed as establishing a federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian." P.L. 104-235, § 112.

Thus, RFRA not only overrides state laws and reduces state options for protecting children as argued *supra*, but it has also influenced federal lawmakers to abandon their conditions for participation in CAPTA with respect to one class of children determined on the basis of their parent's religious beliefs. Such disparate treatment based solely upon religious criteria violates the Establishment Clause and Equal Protection Clauses of the Fourteenth Amendment, and was based upon the assumption that RFRA requires it.

B. RFRA Has Unintended Effects On Establishment Clause Standards.

The enactment of RFRA has also skewed other long-standing legal standards under the Establishment Clause even although RFRA explicitly disclaims any such effect.

In *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F.Supp. 1466 (1996), the Court invalidated 15 sections of United States statutes and regulations which granted to Christian Science sanatoria "operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts" complete exemption from all medical healthcare standards under Medicare and Medicaid, on the grounds they violated the Establishment Clause. In reaching that conclusion, the Court employed the Establishment Clause standard from *Larson v. Valente*, 456 U.S. 228 (1982) which requires, in cases where the law facially discriminates among

religions, justification by a compelling government interest and a close tailoring of the classification.

However, in spite of RFRA's explicit provision that it does not affect the Establishment Clause, the Court found that because RFRA's enactment indicated strong Congressional endorsement of religious accommodation, such accommodation of religion was a compelling governmental interest under the *Larson* standard. The Court held that it was only because the exemptions were not narowly tailored that they violated the *Larson* standard. Thus, contrary to what RFRA's proponent's claim, RFRA may have a significant impact on Establishment Clause jurisprudence as an indication of a compelling governmental interest in religious accommodation, thereby justifying facial discrimination among religious sects.

CONCLUSION

Because RFRA dramatically alters the landscape of nearly all Church/State and Church/individual litigation, its effects are not confined to free exercise of religion, and thus Congress has far exceeded its authority under the Constitution.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

No. 95-2074

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE CENTER FOR THE COMMUNITY INTEREST (IN SUPPORT OF PETITIONER CITY OF BOERNE, TEXAS)

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Center for the Community Interest ("CCI") is a national, not-for-profit organization that drafts, promotes and defends measures that enhance the safety and attractiveness of urban public spaces. CCI works with local officials and communities throughout the country to defend the rights of citizens to protect the quality of life in their cities and to enjoy vibrant, safe and welcoming urban centers. CCI has the consent of all parties to this case to file this amicus brief in support of Petitioner, City of Boerne, Texas.

CCI's efforts to help cities create and protect attractive neighborhoods and public spaces will be greatly affected by the Supreme Court's decision in this case. CCI has substantial experience with municipal regulations designed to promote urban centers, such as zoning regulations and regulations governing the use of public spaces. That experience includes helping reconcile disputes between groups that help the homeless and their host communities, drafting legislation, and consulting with civic and community leaders on urban quality of life issues. CCI believes its experience and perspective can aid the Court in deciding this case.

STATEMENT OF ISSUE

This amicus brief discusses the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb to 2000bb-4 ("RFRA"). RFRA was enacted in response to this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that facially neutral laws of general applicability that burdened the free exercise of religion did not abridge the free exercise of religion if the laws were rationally related to a permissible government interest. RFRA purports to overrule *Smith* and to require courts to strike down facially neutral laws of general applicability that substantially burden the free exercise of religion unless the law is the least restrictive means of achieving a compelling state interest. 42 U.S.C. §§2000bb, 2000bb-1.

This amicus brief addresses whether RFRA violates the Establishment Clause of the First Amendment and whether RFRA is a valid exercise of Congress's power to enforce the Fourteenth Amendment.

STATEMENT OF THE CASE

Over the last several decades, the major urban centers of the United States have been slowly abandoned in favor of suburbs. This migration has been driven in large part by the declining quality of city life and the increasing disorder that characterizes city neighborhoods, downtown centers, streets and parks. People seek places of relative calm and civility when making a home. If they cannot find these things in cities, those who can leave.

RFRA seriously compromises a city's ability to enforce zoning codes and regulations governing the use of public spaces to ensure that residential areas remain places where people want to live, and to regulate the use of parks so that people can gather and play together. Many religious organizations and churches believe that their spiritual mission is to minister to the poor. To carry out this mission, some churches have established centers to feed and shelter the homeless and the hungry—sometimes hundreds of people at a time—on church property. Very often churches, and their shelters and soup kitchens, are located in a city's residential neighborhoods. Other churches have set up mobile centers to feed the poor in city parks.

While the efforts of churches and religious organizations to feed and shelter the poor are certainly well-intentioned, they bring a host of problems into the residential neighborhoods and parks in which they operate. Centers to provide services to the poor and hungry can attract large numbers of needy individuals, greatly increasing the number of people coming into residential neighborhoods. Often that increased flow of traffic means an increase in littering, noise, unruliness, and sometimes harassment of neighborhood residents by the patrons of these centers.

Religiously motivated efforts to feed the hungry differ little from the efforts of many secular organizations that feed and shelter the poor. Indeed, RFRA has created the main difference between the two: communities cannot equally regulate centers to feed and shelter the poor that are run by religious groups. *See, e.g., Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 545-46 (D.D.C. 1994) (granting permanent injunction on church's motion for summary judgment against zoning board's decision that church's center to feed the poor could not operate in residential neighborhood).

Communities that seek to address these problems of public order and maintenance of community values are neither anti-religious nor anti-poor. Rather, they are legitimately concerned about the problems that these facilities sometimes produce. They want help given to those who need it, *and* they want safe and pleasant neighborhoods. It is possible for churches and religious groups to provide for those in need in a safe and community-friendly way, so long as cities have tools at their disposal to enable them to regulate those centers effectively. Indeed, countless centers to provide services to the homeless operate successfully under local regulation and have done so for many years.

RFRA, however, has vastly complicated city regulation of church-run centers. The principal tools available to cities and communities that seek to reduce the problems caused by centers to feed and shelter the poor are zoning and health and safety codes. But under RFRA, a church may legitimately claim protection to set up a soup kitchen to feed over a hundred people a day on its premises even though zoning codes would prohibit a restaurant from operating in that same residential neighborhood.

Such a sweeping exemption from facially neutral laws of general applicability is unprecedented and wrong. RFRA does not merely restore the law of free exercise to its pre-*Smith* status. Prior to *Smith*, a heightened level of protection for activities of religious groups was only used to

invalidate state unemployment compensation programs that conditioned eligibility on an applicant's willingness to work under conditions prohibited by his religion. *See Smith*, 494 U.S. at 883. For other types of cases, this Court "sometimes purported to apply" the compelling state interest test but "always found that test was satisfied" when applied to state laws of general applicability that burdened an individual's free exercise of religion (*Smith*, 494 U.S. at 883 (citing as an example *United States v. Lee*, 455 U.S. 252, 259-61 (1982), which upheld Social Security tax against free exercise claim of Amish)), and then this Court ultimately dropped the compelling state interest test altogether for free exercise claims. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (declining to apply compelling state interest test to claim that construction of United States Forest Service road through area sacred to American Indian tribe violated tribe's free exercise of religion).

RFRA greatly expands the application of strict scrutiny to *all* cases where a religious organization claims that a law of general applicability substantially burdens its free exercise of religion. Particularly with respect to laws such as zoning laws and park regulations, RFRA's broad exemption for anyone claiming that a law substantially burdens the free exercise of religion seriously hampers cities' legitimate efforts to preserve the safety and character of residential neighborhoods and parks and to regulate land uses in appropriate ways.

SUMMARY OF ARGUMENT

This Court should find RFRA unconstitutional for two reasons: (1) it is an establishment of religion; and (2) Congress acted outside of its power to enforce the Fourteenth Amendment when it passed RFRA.

Laws that have no secular purpose and that have as their primary effect the advancement of religion amount to an unconstitutional establishment of religion under the First Amendment. RFRA is such a law. Its purpose and its

primary effect are the advancement of religion by exempting religiously motivated actors from laws of general applicability whenever such laws interfere with the exercise of religion.

Congress had no constitutional authority to pass RFRA. Congress may only act if the Constitution has given it the power to do so. Congress's articulated view that it was passing RFRA under its authority to enforce the Fourteenth Amendment was incorrect: the Fourteenth Amendment only empowers Congress to enact legislation to protect individuals from incursions by the states against their rights guaranteed by the Fourteenth Amendment; it does not empower Congress to reverse Supreme Court decisions interpreting the scope of those rights.

ARGUMENT

I.

RFRA VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

"A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor *religious adherents collectively over nonadherents.*" *Board of Education v. Grumet*, 512 U.S. 687, 129 L. Ed. 2d 546, 556 (1994) (internal quotations omitted) (citations omitted) (emphasis added). By imposing strict scrutiny review on *all* facially neutral laws of general applicability that substantially burden the exercise of religion, RFRA violates the Establishment Clause: Congress cannot place the *religious* claims of some over the secular policy judgments of others. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (finding law giving employees right to take off Sabbath unconstitutional on grounds that religious concerns "automatically control" secular concerns of workplace). Congress also may not place claims to act for religious reasons above similar claims to act for secular reasons of moral conscience. RFRA does both and is unconstitutional.

This Court has adopted a three-part test first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), to determine if a law is an unconstitutional establishment of religion. To be constitutional, the law at issue must (1) serve a secular legislative purpose; (2) have as its primary effect neither the advancement nor inhibition of religion; and (3) not foster an excessive governmental entanglement with religion. *See Thornton*, 472 U.S. at 708. A law is unconstitutional if it fails to satisfy any one of these three criteria. *See, e.g., id.* at 709-10 (finding law unconstitutional because its primary effect was advancement of religion). RFRA should be found unconstitutional because it fails to meet two of these factors: it has no secular purpose, and its primary effect is the advancement of religion.

A. RFRA Violates The Establishment Clause Because It Has No Secular Purpose.

RFRA has no secular purpose. RFRA protects only persons who assert religious beliefs or practices—not moral convictions in general—from the burden of laws of general application. Although "government may (and sometimes must) accommodate religious practices" without violating the Establishment Clause, at some point "benevolent neutrality which will permit religious exercise to exist . . . without interference" will "devolve into 'an unlawful fostering of religion.'" *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987). In *Corporation of the Presiding Bishop*, this Court upheld the exemption for the secular nonprofit activities of religious organizations from Title VII's ban on discrimination on the basis of religion. In that case, this Court found that Title VII's exemption to religious organizations had a secular purpose because Congress did not abandon neutrality with respect to religion "with the intent of promoting a particular point of view in religious matters." *Id.* at 335.

RFRA is unlike Title VII's exemption for religious organizations and is not merely a benign accommodation of

religion. By exempting religiously motivated persons from laws of general applicability that substantially burden their ability to act in accordance with their religion, Congress gives such persons the privilege to act in accordance with their religious views in contravention of state and local laws that still apply to everyone else. It does not, however, give a similar exemption to those who act according to the dictates of secular moral conscience. RFRA effectively elevates the commands of religion above those of secular moral conscience. *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 285 (1994) (arguing that "Congress would be hard-pressed to offer a rationale for RFRA's singular protection of religious liberty that is not in some way religious or that does not in some way establish religion as a governmentally preferred activity"). Congress is forbidden from expressing a preference for all religions generally over irreligion. *See Lee v. Weisman*, 505 U.S. 577, 610-11 (1992) (Souter, J., concurring); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448 (1994) (arguing that "the idea of a broad privilege for religiously motivated conduct baldly contradicts the best understanding of the foundations of religious freedom").

RFRA does not merely advance the secular interest of enforcing constitutional rights. In *Smith*, the Court interpreted the Free Exercise Clause to mean that facially neutral laws that burden the free exercise of religion are not unconstitutional if they are rationally related to a legitimate state interest. *Smith*, 494 U.S. at 890. RFRA purports to create new statutory rights to prohibit states and cities from enforcing laws that would be upheld as constitutional if interpreted under *Smith*. Because RFRA purports to create a new set of statutory rights only for the religiously motivated, RFRA has no secular purpose and is unconstitutional.

B. RFRA Violates The Establishment Clause Because Its Primary Effect Is To Advance Religion.

RFRA also violates the Establishment Clause because its primary effect is to advance religion. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), this Court found unconstitutional a Connecticut statute that gave sabbath observers the absolute right to take their sabbath day off from work without suffering any penalty from their employers. The Court held that the law's primary effect was to advance religion and, accordingly, that it violated the Establishment Clause. By requiring employers to conform their business practices to the observance of sabbath days, the "State . . . commands that Sabbath religious concerns automatically control over all secular interests at the workplace." *Id.* at 709. No one has the right under the First Amendment to "insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (quoting Judge Learned Hand in *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Congress, therefore, may not require that the religious necessities of some control the secular concerns of the community at large.

Like the law at issue in *Thornton*, RFRA requires that states and localities conform their land use ordinances, their zoning laws, their park use regulations, and indeed, *all* of their laws, to the tenets of the various religions practiced within their jurisdiction. It commands that laws promoting quality of life for all city residents give way to religiously motivated efforts to feed and shelter the poor unless the law in question is the least restrictive means of achieving a compelling state interest. In practice, RFRA's primary effect is to exempt religious activities from state and local laws.[1] RFRA violates the Establishment Clause because it com-

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[1]Strict scrutiny is a nearly insurmountable hurdle. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (observing that strict scrutiny is virtually impossible to satisfy in the equal protection arena).

mands that religious concerns "automatically control over all secular" public policy interests. *Thornton*, 472 U.S. at 709.

II.
RFRA IS UNCONSTITUTIONAL BECAUSE CONGRESS HAD NO POWER TO PASS IT UNDER ITS POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

Congress cannot pass legislation unless the Constitution specifically grants it power to do so. *United States v. Lopez*, 511 U.S.--, 131 L. Ed. 2d 626, 633-34 (1995). Congress passed RFRA purportedly under its power to enforce the Fourteenth Amendment through appropriate legislation. S. REP. NO. 103-111, at 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903. Section 5 of the Fourteenth Amendment permits Congress to enact legislation to enforce the guarantees of the Fourteenth Amendment (*Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966)), including the Bill of Rights as incorporated by the Fourteenth Amendment's Due Process Clause. Congress has less power to enforce the Bill of Rights than it has to enforce the Civil War Amendments under its Fourteenth Amendment powers. *See Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion by Black, J.) (stating that Congress operates at the height of its Section 5 powers when it acts to enforce the Civil War Amendments' ban on racial discrimination).

A law may be upheld as within Congress's power to enforce the Fourteenth Amendment if (1) it "may be regarded as an enactment to enforce the Equal Protection Clause"; (2) it is "plainly adapted toward that end"; and (3) it is not prohibited by and is consistent with "the letter and spirit of the constitution." *Morgan*, 384 U.S. at 651. RFRA exceeds Congress's power to enforce the Fourteenth Amendment because it fails all three prongs of the *Morgan* test.

First, RFRA exceeds Congress's power to legislate because it does not enforce the Free Exercise Clause against incursions by the *states*. Because the Fourteenth Amend-

ment only applies to the states (*see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that, as Fourteenth Amendment did not apply to congressional acts, prohibition against racial segregation by federal government must reside in Fifth Amendment Due Process Clause)), Congress's enforcement power only extends to efforts by the states to undermine rights guaranteed by the Fourteenth Amendment. RFRA was not passed to undo any specific or pattern of state laws that undermined the free exercise of religion. Rather, Congress passed RFRA to undo what it saw as too narrow a definition of the right to free exercise by this Court. 42 U.S.C. §2000bb. RFRA stands in direct contrast to the Voting Rights Act of 1965, upheld as constitutional by this Court, in which Congress prohibited New York's English literacy requirements to vote. *Morgan*, 384 U.S. at 654-56. There, the Supreme Court found that this act of Congress secured for the Puerto Rican community nondiscriminatory treatment by government. RFRA does not secure the right to free exercise of religion against specific state efforts to limit that right. Instead, RFRA defines the scope of free exercise rights in an attempt to undo a Supreme Court decision it thought too narrowly circumscribed those rights.

Second, RFRA exceeds Congress's power to enforce the Fourteenth Amendment because it is not plainly adapted toward the end of enforcing the Free Exercise Clause. RFRA does not even attempt to *enforce* the Free Exercise Clause. Rather, it quite baldly purports to *define* the scope of free exercise protection and attempts to reverse this Court's construction of the Free Exercise Clause in *Smith*: Congress states that the purpose of RFRA is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases." 42 U.S.C. §2000bb(b)(1). Congress even goes so far as to set out the standard for courts to follow in adjudicating free exercise claims. 42 U.S.C. §2000bb-1. Rather than enforcing the Free Exercise Clause against incursions by the states, RFRA purports to redefine the scope of the Constitution itself as

interpreted by this Court in *Smith*. As such, RFRA is not plainly adapted toward the end of enforcing the Free Exercise Clause.

Respondents may argue that *Morgan* supports Congress's power to enact RFRA and overrule *Smith*. Prior to Congress's act banning New York's English literacy requirement at issue in *Morgan*, the Supreme Court in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 52-53 (1959), held that North Carolina's English literacy requirement was facially constitutional. Respondents may argue, like RFRA's reversal of *Smith*, the Voting Rights Act of 1965 reversed the Supreme Court's decision in *Lassiter* by banning literacy requirements.

Such an argument misinterprets this Court's decisions in *Lassiter* and *Morgan*. Because *Lassiter* was only a facial challenge to North Carolina's literacy requirement and Congress in enacting the Voting Rights Act made findings as to the actual discriminatory effect of New York's literacy requirement, Congress did not "reverse" the Court's decision in *Lassiter*. *See Morgan*, 384 U.S. at 654 ("Congress might well have questioned . . . , and some evidence suggest[ed] that prejudice played a prominent role in the enactment of [New York's] requirement"); *see also Hamilton v. Schriro*, 74 F.3d 1545, 1568 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996) (McMillian, J. dissenting) (explaining in this respect the difference between Voting Rights Act and RFRA).

RFRA is unquestionably an attempt by Congress to reverse *Smith* and to usurp the quintessential judicial power to determine the meaning of the Constitution in particular cases by requiring the courts to return to a standard of review this Court found unworkable and abandoned in *Smith*. As such, RFRA is akin to the federal law this Court held unconstitutional in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S.--, 131 L. Ed. 2d 328 (1995). That law directed the courts to apply a particular limitations period to private lawsuits for securities law violations after this Court had determined that a different limitations period applied. *Id.*

at 339-40. *Plaut* reaffirmed the principle first enunciated in *Marbury v. Madison*—that it is unequivocally the province of the courts to say what the scope of a law is. *Id.* at 342, 345. It is the province of the courts, not Congress, to interpret the scope of constitutional rights and to devise standards of review for determining when violations of those rights have occurred. Section 5 of the Fourteenth Amendment does not alter that balance of powers.

Lastly, RFRA fails the third prong of the test set out in *Morgan* because it is not "consistent with the letter and spirit of the constitution." In other words, Congress may not violate any other provision of the Constitution when exercising its power to enforce the Fourteenth Amendment. Congress violated the Establishment Clause when it enacted RFRA because RFRA has no secular purpose and its primary effect is to advance religion.

CONCLUSION

RFRA grants a sweeping exemption from local and state laws to persons claiming a religious motivation to violate those laws, such as churches and religious organizations that ignore zoning ordinances and operate centers to feed and shelter the poor in residential areas and parks. In so doing, RFRA hamstrings cities' and states' efforts to protect

and enhance the quality of life for all who live in urban areas. CCI respectfully requests that this Court hold RFRA unconstitutional.

DATED: November 27, 1996.

Respectfully,

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Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

No. 95-2074

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and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Petitioner.[1] Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant issues related to the

[1] Consent to the filing of this brief has been granted by counsel for all parties *via* a stipulation previously lodged with the Clerk and a letter of consent from the United States filed simultaneously herewith.

Constitution and democratic government, particularly in the areas of federalism and states' rights. Because this case raises questions relating to the proper bounds of federal power, we believe our perspective will complement the briefs of the parties and assist the Court in the resolution of the issues at hand.

SUMMARY OF ARGUMENT

In enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, Congress stated expressly that Section 5 of the Fourteenth Amendment supplied its authority. S. Rep. No. 11, 103d Cong., 1st Sess. 13-14 (1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993). It is not remarkable that Congress would rely on Section 5. Congress has enacted numerous laws under this authority, most of which have been upheld by this Court. *E.g.*, *City of Rome v. United States*, 446 U.S. 156 (1980); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *The Civil Rights Cases*, 109 U.S. 3 (1883). What is remarkable about Congress's action is that Section 5 grants Congress the "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," and RFRA imposes on the states extra-constitutional burdens that this Court has held are not required by the Fourteenth Amendment itself. *Employment Division v. Smith*, 494 U.S. 872 (1990).

RFRA is a fulfillment of the Court's holding in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that Congress could "prohibit the enforcement of . . . state law" under Section 5 "[w]ithout regard to whether the judiciary would find [that Section 1 of the Fourteenth Amendment so required]." *Id.* at 649. *Morgan* has been read as approving Section 5 both as remedial authority to "eliminate the case-by-case process of adjudicating

constitutional violations"[2] (*see id.* at 652-53) and as a substantive power by which Congress may determine for itself the meaning of the Fourteenth Amendment (*id.* at 653-56).[3] In *Morgan*, this Court upheld a provision of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), that forbid English literacy requirements as a qualification to vote even though this Court had previously upheld the constitutionality of such requirements. *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959). Stating that the "language [and] history" (*Morgan*, 384 U.S. at 648) of the Fourteenth Amendment supported its view, the Court held that Congress could compel or forbid state practices even where this Court had held that the practice did not violate the Fourteenth Amendment. So long as Congress does not "restrict, abrogate, or dilute [the Fourteenth Amendment's] guarantees" (*id.* at 651 n.10), there are no apparent restrictions on what Congress can enact in the name of due process and equal protection.[4]

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[2] Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 42 (1995).

[3] *Id.* at 46-53; Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1616-24 (1995).

[4] While some members of the Court have described *Morgan* as resting on deference to congressional fact finding, *e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J.; plurality opinion); *Oregon v. Mitchell*, 400 U.S. 112, 248-49 (1970) (Brennan, J., concurring and dissenting), no such deference can be given to Congress in RFRA. Congress has stated as plainly as it can that it disagrees with the Court on the meaning of the First Amendment. 42 U.S.C. § 2000bb(a), (b) (RFRA "restores" the compelling interest test "virtually eliminated" in *Employment Division*). *See also Remarks on Signing the Religious Freedom Restoration Act of 1993*, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993) (RFRA "reverses" the Court's decision in *Employment Division*). Whatever construction of *Morgan* might be had in other circumstances, in RFRA Congress took from *Morgan* the most aggressive approval of its powers.

Justice Harlan, joined by Justice Stewart, dissented in *Morgan*. He would have held that Section 5 gave Congress power "to take appropriate remedial measures to redress and prevent. . . wrongs," but that its remedial authority depended on "recognized state violations of federal constitutional standards hav[ing] occurred." 384 U.S. at 666 (Harlan, J., dissenting). Otherwise, he reasoned, if Section 5 were a substantive power, "Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution." *Id.* at 667-68. Justice Harlan's warning has been borne out in RFRA.

Justice Brennan's majority opinion and Justice Harlan's dissenting opinion mirror precisely the debates of an earlier generation over the scope of Congress's power under the Fourteenth Amendment. Those debates tell a tale of two provisions: The first was Representative John Bingham's original proposed amendment, which would have given Congress plenary authority to revise the laws of the states to secure equal protection of life, liberty and property. As discussed in greater detail herein, Bingham's proposal was widely understood as substantive authority, conferring upon Congress the original power to enact uniform laws, to secure *equal* protection by providing the *same* protection nationwide. The second provision, a proposal that became our Fourteenth Amendment, enjoined the states from denying equal protection and due process of law and gave Congress the power to "enforce, by legislation, [those] provisions." U.S. Const. Amend. XIV, § 5. The amendment was contemporaneously understood to require equality within each state's laws and to empower Congress with remedial authority, the authority to enforce the provision when a state failed to observe it.

As we show in Part I, this Court in *Morgan* effectively resurrected John Bingham's original proposal — which had been,

as one Representative put it, "given its quietus . . . where it slept the sleep that knows no waking" (Cong. Globe, 42d Cong., 1st Sess. app. 115 (1871) (statement of Rep. Farnsworth)) — and rejected the more modest enforcement power actually granted Congress in Section 5. *See* 384 U.S. at 650 & n.9. This reading is completely inconsistent with the "text [and] history" *Morgan* purported to rely on. To the extent *Katzenbach v. Morgan* stands for such a proposition, it should be overruled. In Part II, we demonstrate that, even if the *Morgan* power is a reasoned interpretation of Section 5 it should be extended to incorporated rights and, in particular, the First Amendment.

ARGUMENT

I. SECTION 5 DOES NOT GRANT CONGRESS THE POWER TO ENFORCE EXTRA-CONSTITUTIONAL RIGHTS; *KATZENBACH v. MORGAN* IS INCONSISTENT WITH THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT AND SHOULD BE OVERRULED.

A. Bingham's Proposed Amendment And Congress's Power to Make Uniform National Laws

When the Thirty-Ninth Congress assembled in December of 1865, it formed a 15 member bi-partisan Joint Committee on Reconstruction to draft various pieces of legislation, including a new amendment to the Constitution.[5] In February 1866, a mem-

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[5] *See Oregon v. Mitchell*, 400 U.S. at 155-67 (Harlan, J., concurring and dissenting) (recounting history of Fourteenth Amendment). Other useful chronologies of these events are found in Horace Flack, *The Adoption of the Fourteenth Amendment* (1908); Joseph B. James, *The Framing of the Fourteenth Amendment* (1956); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949).

ber of the Joint Committee, Ohio Republican John Bingham, proposed an amendment. It read in its entirety:

> ARTICLE __. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Bingham explained that his proposal constituted "an express grant of power upon the Congress" and followed language from the Comity Clause (Art. IV, § 2) and the Due Process Clause (Amend. V). *Id.* Three days of intense debate followed in the House.

Immediately following Bingham's introduction of the proposed amendment, Representative A.J. Rogers, a New Jersey Democrat and member of the Joint Committee, rose to speak. Rogers argued that the proposal was "the embodiment of centralization and the disfranchisement of the States," and its effect was to "take away the power of the States; and to interfere with the internal police and regulation of the States." Cong. Globe, 39th Cong., 1st Sess. app. 133, 134 (1866). Rogers was not alone, and his concerns held sway on both sides of the aisle. *See Oregon v. Mitchell*, 400 U.S. at 260 (Brennan, J., concurring and dissenting). Democrat Garrett Davis criticized the Bingham proposal as a "grant for original legislation by Congress. . . . [Congress] . . . is itself the judge of the measure of [equal] protection. Its legislation may be universal. It may enlarge protection, it may circumscribe it and limit it, if only it make it equal." Cong. Globe, 39th Cong., 1st Sess. 1087 (1866). Republican Robert Hale of New York thought it would be easy enough to show that "every State in this Union fails to give equal

protection to all persons within its borders in the rights of life, liberty, and property." *Id.* at 1064. Hale assailed Bingham's proposal as "a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, . . . may be overridden, may be repealed or abolished, and the law of Congress established instead." *Id.* at 1063.

On the Senate side, Republican Senator William Stewart, a supporter of the legislation, understood Bingham's proposal in much the same way, as a power to make the laws in the states not only *equal*, but the *same*. Quoting Bingham's proposal, Stewart observed:

> Congress shall have power by law to make all the laws in all the States affecting the protection of either life, liberty, or property, precisely similar; . . . . Congress must examine and modify all these laws, so that they shall afford the same protection in all the States that they do in any. The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States. When this was done, there would not be much left for the State Legislatures . . . .

Cong. Globe, 39th Cong., 1st Sess. 1082 (1866).

Representative Bingham himself had the opportunity to deny that this was both the intent and the effect of his proposal. Late in the House debates, Hale asked Bingham directly "whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property." Cong. Globe, 39th Cong., 1st Sess. 1094

(1866). Bingham obfuscated: "It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." *Id.* The last Representative to speak was New York's Giles Hotchkiss, who began with the observation that "Constitutions . . . should be so plain that the common mind can understand them." *Id.* at 1095. He too objected that while the "object in . . . proposing this amendment is to provide that no State shall discriminate between its citizens," the Bingham proposal "by its terms . . . authorize[s] Congress to establish uniform laws throughout the United States upon . . . the protection of life, liberty, and property." *Id.* He questioned whether the Bingham proposal would actually result in the equality Bingham advocated, since subsequent Congresses could revise the laws at will. Instead, Hotchkiss proposed, "[w]hy not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens." *Id.* The House then voted 110 to 37 to table Bingham's proposal, with Representative Bingham himself voting to postpone. *Id.* It was never reconsidered.

B. The Fourteenth Amendment And Congress's Power to Enforce Equal Protection of State Laws

In May 1866, Republican Representative Thaddeus Stevens, a member of the Joint Committee, introduced a redrafted proposed amendment. The new proposal was substantially the same as our Fourteenth Amendment.[6] In contrast to Bingham's proposal, which authorized Congress to define equal protection, Section 1 of the proposed amendment directly prohibited the states from denying equal protection and due process of law. According to Stevens, it would allow Congress "to correct the unjust legislation of the States, so far that the law which operates

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[6] The only significant change in Section 1 was the addition of the Citizenship Clause.

upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same extent." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (emphasis in original). When Senator Jacob Howard introduced the proposed amendment in the Senate, he similarly emphasized that Section 1 was a direct prohibition on the states, an equality provision, that forbade "the hanging of a black man for a crime for which the white man is not to be hanged." *Id.* at 2766. According to Howard, Section 5 was a "delegation of power to Congress to carry out all the principles of all these guarantees." *Id.* Section 1 of the proposed amendment occasioned surprisingly little debate. The proposed amendment was adopted in June 1866 and ratified by the states in 1868.

The contrast between Bingham's proposal and the Fourteenth Amendment is stark. Both had as their objective the securing of equal protection, but they suggested radically different means of achieving that end. In the views of members of Congress, Bingham's proposal would have ensured equal laws by making them the same; it would have given Congress authority to enact uniform laws. Since Congress would have plenary authority to enact laws to secure all privileges and immunities and equal protection, Congress would have simply displaced state laws with federal law, thereby guaranteeing not just equal laws but the same laws. On the other hand, Section 1 of the Fourteenth Amendment guarantees equality under the law, but does not demand uniform laws. This is consistent with the admitted purposes of the Fourteenth Amendment, one of which was to constitutionalize the Civil Rights Act of 1866. *See* Cong. Globe, 39th Cong., 1st Sess. 1292-93 (1866) (statement of Rep. Bingham). That Act provided that all persons should enjoy "the same [civil] right[s] in every State . . . as [are] enjoyed by white citizens, and shall be subject to like punishment." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The Civil Rights Act promised that whatever substantive laws a

state adopted protected equally white and black citizens.[7] The Fourteenth Amendment does not require national uniformity in order to guarantee equality; it recognizes the continued vitality of the states, but imposes a duty on them to provide equal protection to all of their citizens and gives Congress the power to enforce that duty.

This understanding of the substantial differences between the two provisions was confirmed in the civil rights enforcement debates in 1871. In those debates, which were far more detailed than the debates of 1866, members of Congress argued over the scope of the Fourteenth Amendment and, in particular, the relationship between Sections 1 and 5. John Bingham argued that the Fourteenth Amendment and his earlier, failed proposal were not only substantially the same, but that Congress actually had acquired *greater* power under the Fourteenth Amendment. After claiming authorship of the Fourteenth Amendment and quoting Sections 1 and 5, Bingham stated:

> The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

Cong. Globe, 42d Cong., 1st Sess. app. 83 (1871).

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[7] *See* William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 118 (1988); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1410-13 (1992).

Bingham's contention was carefully answered by fellow Ohio Republican James Garfield, who disagreed with Bingham's characterization and explained the difference:

> The [Fourteenth Amendment] exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State over these subjects. The [Bingham proposal] gave Congress plenary power to cover the whole subject with its jurisdiction . . . to the exclusion of the State authorities.

Cong. Globe, 42d Cong., 1st Sess. app. 151 (1871). Then Garfield related that

> it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution . . . it became perfectly evident, both to the members of the Senate and of the House, . . . that the measure could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn.

Id. Garfield concluded, "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to [Section 5] . . . the force and effect of the

rejected clause." *Id.* In like fashion, John Farnsworth of Illinois confronted Bingham, quoted extensively from the 1866 debates, and then cited lengthy passages from Thaddeus Stevens' speeches to show that the Bingham proposal "was abandoned and a different amendment substituted, different in form and substance, and so understood by Congress." *Id.* at app. 115.

C. The Consequences of the Framers' Choice of the Fourteenth Amendment Over Bingham's Proposal

As members of Congress made clear in the debates of 1866 and 1871, the Bingham proposal was a pure grant of power to Congress. The proposal had no self-enforcing provision, no provision that was judicially enforceable. Under the Bingham proposal, Congress would have been the sole judge of what privileges and immunities and protection of life, liberty and property citizens should possess. Section 1 of the Fourteenth Amendment, by contrast, was judicially enforceable in the same way as the state disabilities in Article I, Section 10, after which it was patterned. *See* Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham) (describing that he had imitated Article I, Section 10 with the phrase "No State shall"). *See also id.* at app. 260 (statement of Rep. Holman); *id.* at app. 221 (statement of Sen. Thurman).

There are two consequences of the framers' choice between the Bingham proposal and our present Fourteenth Amendment: first, enforcement of Section 1 lies primarily, although not exclusively, with the judiciary; second, a prerequisite to congressional enforcement of Section 1 is a finding that the states have violated that Section.

1. Judicial Interpretation and Enforcement of Section 1

The framers of the Fourteenth Amendment understood that Section 1, like the other provisions of the Constitution that begin with the words "No State shall" (Art. I, § 10, cls. 1-3) would be enforced principally by the courts.

> The first Section of the amendment requires no legislation; "it is a law unto itself," and the courts can execute it. If it requires "enforcing" legislation, what kind does it require? Certainly not a law which goes a long way beyond the scope of the provision. . . . [T]he only "legislation" we can do is to "enforce" the provisions of the Constitution upon the laws of the State.

Cong. Globe, 42d Cong., 1st Sess. app. 117 (1871) (statement of Rep. Farnsworth). Representative Holman argued that Section 1 was a "positive limitation and nothing more," and that when states violated Section 1, no one should "doubt the completeness of the remedy . . . . The Supreme Court will declare the law void." *Id.* at app. 259. *Accord id.* at app. 315 (statement of Rep. Burchard).

The Court confirmed this understanding in *United States v. Harris*, 106 U.S. 629 (1882). In that case the Court struck down a section of the Civil Rights Act of 1871 making it criminal for private persons to interfere with the "equal privileges and immunities under the laws." The Court denied that Section 5 could sustain the act because the Fourteenth Amendment referred to state action exclusively. In the process the Court suggested the remedial limits of the Amendment:

> The language of the Amendment does not leave this subject in doubt. When the State has

> been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, *the Amendment imposes no duty and confers no power upon Congress.*

Id. at 639 (emphasis added).

2. Congressional Enforcement of Violations of Section 1

The second implication of the framers' choice between the Bingham proposal and our Fourteenth Amendment is precisely what Section 5 says: Congress has power to *enforce* the Amendment. When Section 5 is read side by side with Bingham's proposal, it becomes evident that the term "enforce" is a term of limitation on what could have been a much broader grant of power to Congress. Congress, of course, was not deprived of any power at all in the Fourteenth Amendment. Section 5 is plainly a grant of authority, but it is not the unbounded grant that was the original Bingham proposal. Nor is it merely a Necessary and Proper Clause (Art. I, § 8, cl. 18). There are two significant differences. The Necessary and Proper Clause authorizes Congress to pass laws to "*execute*" the "*powers*" of the federal government. Section 5 grants Congress the power to "*enforce*" the "*provisions*" of the Amendment. "Execute" is a broader term than "enforce." The President's power to "take Care that the Laws

be faithfully executed" (Art. II, § 3) encompasses not only the power to charge past violations of the law, but the power to administer, to regulate, and to promulgate standards for future application. Section 5 grants Congress the power to "enforce": it is the power to see that laws are observed.

On the other hand, the Necessary and Proper Clause applies to the "powers" of the government, while Section 5 applies to "provisions." Powers are those things the federal government is affirmatively authorized to do, in contrast to disabilities, prohibitions, or restrictions on federal power. Thus, despite the broad scope of the Necessary and Proper Clause, the Court has held that Congress has no power to execute certain clauses in the Constitution, such as the Comity Clause which, as a restriction on the states, is self-enforcing. *United States v. Wheeler*, 254 U.S. 281, 293-94 (1920); *United States v. Harris*, 106 U.S. 629, 643-44 (1882). Section 5, by contrast, applies to the "provisions" of the Fourteenth Amendment. As the first Justice Harlan observed in *The Civil Rights Cases*, the purpose of Section 5 is "to enforce 'the *provisions* of *this article*' of Amendment; not simply those of a prohibitive character, but the provisions — *all* of the provisions — affirmative and prohibitive, of the Amendment." 109 U.S. at 46 (Harlan, J., dissenting) (emphasis in original). In this respect Section 5 is broader than the Necessary and Proper Clause. Congress may enforce all of the provisions of the Fourteenth Amendment, but it is limited to just that — "enforcement." *See The Civil Rights Cases*, 109 U.S. at 11; *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879).

The term "enforce," when read together with Section 1, means that Congress may enact "appropriate legislation" when the states have violated Section 1. Senator Howard, as he introduced the redrafted proposed amendment in the Senate, explained that Section 1 was a "restrain[t] [on] the power of the States . . . [and] not powers granted to Congress." Cong. Globe, 39th Cong., 1st

Sess. 2766 (1866). When he read Section 5 together with Section 1, he said it "cast[] upon Congress the responsibility of seeing . . . that all the sections of the amendment are carried out. . . . It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.* at 2768. *See* Cong. Globe, 42d Cong., 1st Sess. app. 160 (1871) (statement of Rep. Golladay). James Garfield agreed that "[w]henever such a state of facts is clearly made out, . . . the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." Cong. Globe, 42d Cong., 1st Sess. app. 153 (1871). And as Senator Norwood said, "until a State shall attempt to abridge [a citizen's] rights, Congress has no power to act." Cong. Rec., 43d Cong., 1st Sess. app. 244 (1874).

The Court confirmed this understanding in *The Civil Rights Cases*, 109 U.S. 3 (1886). Section 5 did "not authorize Congress to create a code of municipal laws for the regulation of private rights." *Id.* at 11. Rather, Congress's authority was remedial in nature, "provid[ing] modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment." *Id.*

D. *Morgan's* Reliance on the "Language [and] History" of the Fourteenth Amendment Is Flawed

This history points inexorably to the conclusion that this Court's holding in *Morgan* went too far. The Court purported to have relied on the "language [and] history" of Section 5 (384 U.S. at 648), yet the Court only cited secondary sources and a single statement by Senator Jacob Howard. This is a thin reed on which to have based so important a proposition. Moreover, the Court cited the secondary sources for the unremarkable observation that

"the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary." 384 U.S. at 648 n.7. That statement is true, but irrelevant. Bingham was "interested" in augmenting Congress's power, but, as we have seen, he was not entirely successful in his efforts. For the framers, the most controversial provisions within the Fourteenth Amendment were Sections 2 (representation in Congress) and 3 (disability from holding public office for those engaging in rebellion). *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2459-60 (1866) (statement of Rep. Stevens) (Section 2 was "the most important in the article"; Section 3 "may encounter more difference of opinion here"). Both of these sections required congressional action and enforcement. On the basis of Sections 2 and 3 alone, it could be said that Congress was primarily interested in augmenting its own power.

More significantly, the Court cited only a single statement of Senator Howard for the expansive proposition that "[a] construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." 384 U.S. at 648. The Court quoted Howard:

> [Section 5] casts upon Congress the responsibility of seeing to it, for the future that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.

384 U.S. at 648-49 n.8 (quoting Cong. Globe, 39th Cong., 1st Sess. 2768 (1866)). The Court then commented that Howard's statement was "not questioned by anyone in the course of the debate." *Id.*

Senator Howard's imprecise statement does not support the Court's conclusion. First, as Howard made clear, the power of Congress is the power to "*correct*" state laws in "conflict" with the Fourteenth Amendment. It is not, as the Court held in *Morgan*, the power to *prescribe* law in opposition to the Court's express finding that no violation of the Fourteenth Amendment has occurred. Second, even if Howard's statement could be said to support the Court's holding, the Court cited only Howard, ignoring the larger context for the adoption of the revised amendment. It was passed against the background of a far more aggressive proposal, one that would have given Congress far greater discretion — one that Congress had concluded it could not submit to the states for ratification.

Finally, despite the obvious differences between the Bingham proposal and the Fourteenth Amendment, this Court in *Morgan* simply conflated the two. The Court declared that Section 5 "grant[ed] to Congress . . . the same broad powers expressed in the Necessary and Proper Clause." 384 U.S. at 650. *See also United States v. Guest*, 383 U.S. 745, 782-83 (1966) (Brennan, J., concurring and dissenting in part). The Court justified this because John Bingham considered his proposal and the Fourteenth Amendment coextensive and, as the Court noted, "earlier drafts of the proposed Amendment employed the 'necessary and proper' terminology to describe the scope of congressional power under the Amendment." 384 U.S. at 650 n.9. Looking to language that drafters rejected may be an interpretive guide to the language actually adopted, but the inference the Court draws is exactly the wrong one. If any inference at all is to be taken from language considered and rejected, it is that the

rejected language was *not* intended. *See Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 306 (1933); *United States v. Great Northern Ry.*, 287 U.S. 144, 155 (1932); *United States v. Pfitsch*, 256 U.S. 547, 550-52 (1921). *See also Ex Parte Oppenstein*, 233 S.W. 440, 444 (Mo. 1921). It is ironic that the Court read Bingham's proposal into Section 5 *nunc pro tunc*. The framers of the Fourteenth Amendment knew how to say "necessary and proper," and they considered and rejected that formulation.[8]

E. *Morgan* Grants Even Greater Powers to the United States Than Would Have Been Conferred Under Bingham's Rejected Proposal

The Court's holding in *Morgan* not only embraces the powers Congress would have acquired in the Bingham proposal, it goes much further. Under the Bingham proposal, Congress would have been the exclusive judge of what privileges and

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[8] *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 97 ("Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. . . . [T]he power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met."); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 60 (1955) ("Presumably the lesson taught by the defeat of the Bingham amendment had been learned. Congress was not to have unlimited discretion, and it was not to have the leeway represented by 'necessary and proper' power."). *See also* Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869*, at 92 (1990) (arguing that any construction of Section 1 must not be "subject to the objections that caused the rejection of Bingham's original amendment"); Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331, 381 (1967) ("The result of [*United States v. Guest*, 383 U.S. 745 (1966)] is to resurrect the rejected first draft of the Bingham amendment . . . and enshrine it in all of its glory into the fourteenth amendment.").

immunities were required, and what constituted equal protection of life, liberty and property. That meant that under the Bingham proposal, Congress could have expanded or contracted rights, and the Court would have been powerless to correct it because there would have been no standards in the amendment for judging Congress. This was one of the main criticisms of the Bingham proposal, that the entire matter was left to the "caprice" of Congress. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss). Yet, after *Morgan*, the Court sets the baseline and Congress may improve upon, but not take away from, that baseline. The so-called *Morgan* "ratchet" is thus far more state-restrictive than the Bingham proposal because it allows change in one direction only. It engages both the Court and the Congress independently in the process of declaring and then enforcing broad concepts of equal protection and due process.

If the Court is to be taken at its word in *Morgan*, there are no apparent limits to what extra-constitutional standards Congress may impose on the states (so long as it does not cross the Court's baseline). For example, Congress might prescribe the substantive grounds upon which search and seizures may be conducted, restricting the states even more than required by the Fourth Amendment. It could prescribe the number of jurors required in criminal cases, or the qualifications for counsel assisting the accused. Indeed, Congress could enact laws nullifying otherwise constitutional municipal anti-obscenity ordinances. That Congress has not done so or, in the judgment of some, would not do so is quite irrelevant. The question is one of authority, not will. *Morgan* certainly indicates that Congress possesses the authority to do all these things.[9]

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[9]These examples are taken from William Van Alstyne, *An Essay On the Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. ___ (forthcoming November 1996).

In sum, *Morgan* rests on a seriously flawed reading of the Fourteenth Amendment, one that is inconsistent with its text and history. A careful reading of Sections 1 and 5 gives Congress the authority to enact corrective legislation when the courts have held — or would hold — that laws or practices violate the commands of Section 1. It does no violence to the Fourteenth Amendment to conclude that Congress may anticipate, in good faith, that certain state laws and practices, if challenged in court, would violate Section 1. And Congress may engage in its own factual inquiry into such laws and practices and bring its own insights and findings to a conclusion that state laws and practices violate the terms of the Fourteenth Amendment. But it surely does great violence to the Fourteenth Amendment to say that Congress has "enforce[d] [the Fourteenth Amendment] through appropriate legislation" when it proscribes, penalizes, or otherwise corrects state actions that the federal judiciary has declared are fully consistent with the provisions of the Constitution.

II. EVEN ASSUMING THAT THE *MORGAN* POWER MAY BE LEGITIMATELY EXERCISED IN SOME CASES, IT SHOULD NOT BE INVOKED TO REVISE THIS COURT'S PRONOUNCEMENTS ON INCORPORATED RIGHTS GENERALLY, OR THE FIRST AMENDMENT SPECIFICALLY.

Even if *Morgan* represented a considered and principled view of Congress's power to secure the broad contours of equal protection and due process, it should not extend to the specific rights incorporated through the Due Process Clause. It is particularly inappropriate that Congress enforce against the states

a provision that begins "Congress shall make no law . . . ." Amend. I.[10]

In *Morgan* this Court refused to "confine the legislative power" to the task of "particularizing the 'majestic generalities' of § 1." 384 U.S. at 648-49 (*quoting Fay v. New York*, 332 U.S. 261, 282 (1947)). Elsewhere this Court has referred to the "controversies [that] have raged about the cryptic and abstract words of the Due Process Clause." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Because the Equal Protection and Due Process Clauses embrace both majestic and cryptic qualities, it is understandable that in this area the Court would respect "congressional resourcefulness and congressional responsibility for implementing the Amendment." *Morgan*, 384 U.S. at 648.

The majestic generalities of the Fourteenth Amendment become far less abstract once the subject matter changes from equal protection or procedural due process *simpliciter* to the Bill of Rights. Due process rights defined in terms of the First Amendment, for example, are far more specific than the amorphous promise of procedural due process.

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.

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[10] *See* Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995).

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). In the process of incorporating most of the Bill of Rights under the Fourteenth Amendment, the Court has moved deliberately from the position of uncovering rights in a "scheme of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), to applying the precise text of the Bill of Rights.[11] Accordingly, in *Everson v. Board of Education*, the Court recognized that "[t]he First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" 330 U.S. 1, 8 (1947).

The process of incorporation has become so complete that there is no perceptible difference between the First Amendment as applied to the federal government and the First Amendment (incorporated through the Fourteenth) as applied to the states. The Court has long since rejected arguments that First Amendment rights incorporated against the States are subject to a lesser standard than when the First Amendment is applied to the federal government. *See, e.g., Interstate Circuit, Inc., v. Dallas*, 390 U.S. 676, 706 (1968) (Harlan, J., concurring and dissenting) (advocating dual standards); *Memoirs v. Massachusetts*, 383 U.S. 413, 456 (1966) (Harlan, J., dissenting); *Smith v. California*, 361 U.S. 147, 169-70 (1959) (Harlan, J., concurring and dissenting); *Roth v. United States*, 354 U.S. 476, 503 (1957) (Harlan, J., concurring and dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 288-91 (1952) (Jackson, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). More recently, the Court has rejected the argument that the Fourteenth Amendment "impos[es] more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Marsh*

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[11] *See* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746, 747-48 (1965).

v. Chambers, 463 U.S. 783, 790-91 (1983). The Court has also relied on the history of the Bill of Rights as the explanation for those same rights when incorporated against the states. *See, e.g., Marsh v. Chambers*, 463 U.S. at 786-92 (using history of congressional chaplains in challenge to constitutionality of state legislative chaplains); *New York Times v. Sullivan*, 376 U.S. 254, 276-77 (1964) (stating that there is "no force in [the] argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States"); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (discussing history of religious liberty during colonial period in challenge to state busing scheme). In effect, the Court has incorporated the history of the first eight amendments along with the text itself into the Fourteenth Amendment Due Process Clause.

Incorporated rights claim an entirely different provenance, however, than equal protection and procedural due process rights. The latter, by nature, are rights in which the legislature has had a firm hand in shaping. Congress may specify the procedural protections afforded certain rights, and it must routinely make judgments about equal treatment in the allocation of scarce governmental resources. In such cases, some judicial deference is appropriate. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J.; plurality opinion); *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987). Because these are matters on which Congress has experience, it might be concluded that Congress could use the *Morgan* power to correct legislation of the states.

All of this suggests that a different result should obtain when Congress attempts to use the *Morgan* power to enforce the specific commands of the Bill of Rights. Incorporated rights are not matters upon which Congress has great legislative expertise. Matters involving speech and press, search and seizure, self-incrimination, and impartial juries are not areas to which the Court has felt the same obligation of deference. *See, e.g., Turner*

Broadcasting System v. FCC, 512 U.S. ___, 114 S. Ct. 2445, 2471 (1994); *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Moreover, among the rights guaranteed in the Bill of Rights, the First Amendment is unique, and the *Morgan* power should not extend to revising the Court's opinions as a means of "enforc[ing]" the Fourteenth Amendment. By its plain terms, the First Amendment binds Congress alone. And if reference to "Congress" were not sufficiently clear, the Amendment reemphasizes that it is a prohibition on the making of laws.[12] Not only does Congress not have the same experience with the First Amendment as it has with equal protection and due process, the Constitution declares Congress ill-suited to acquire or exercise such expertise.

The declaration of congressional disability embodied in the words "Congress shall make no law" was placed in the First Amendment by design. James Madison's original proposal began, "no religion shall be established by law . . . ." 1 The Debates and Proceedings in the Congress of the United States 729 (Aug. 15, 1789) (Gales & Seaton, 1834). When Representative Huntington objected that this language might be "extremely hurtful to the cause of religion" and would forbid federal courts from enforcing contracts between congregations and their ministers in the

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[12] In this regard, compare Article I, Section 9, Clauses 2 and 3. Clause 2 provides that "Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Clause binds all of the departments of the federal government. By contrast, Clause 3 states: "No Bill of Attainder or ex post facto Law *shall be passed*" (emphasis added). Section 3 applies to the law making branches and not to the judiciary, whose review is necessarily retrospective. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1205 n.330 (1991) (citing John Hart Ely, *Democracy and Distrust* 90 (1980)).

Northeast, the drafters responded by changing the proposed amendment to its present form of "Congress shall make no law." *Id.* at 730. The drafters later extended the language to speech, press and petition. These changes ensured that the federal judiciary could enforce state laws respecting religion, speech and press in cases properly within federal jurisdiction.[13] These changes deliberately left the judiciary free to issue injunctive prior restraints when equity so required.[14] The Constitution consciously uses the term "Congress" in the First Amendment.

The framers of the Fourteenth Amendment recognized the unique status of the First Amendment. During the debates of 1866, Representative Hale commented that the guarantees of the Bill of Rights "are not matters upon which legislation can be based. They begin with the proposition that 'Congress shall make *no law*', . . . and . . . [t]hroughout they provide safeguards to be enforced by the courts, and not to be exercised by the Legislature." Cong. Globe, 39th Cong., 1st Sess. 1064 (1866) (emphasis in original). *See also id.* at 1270 (statement of Rep.

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[13] Mark DeWolfe Howe, *The Garden and the Wilderness* 22-23 (1965); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 Nw. U.L. Rev. 1156 (1986).

[14] Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* (1966); Leo Pfeffer, *Church, State & Freedom* 115-16 (1953); Leonard W. Levy, *The* Legacy *Reexamined*, 37 Stan. L. Rev. 767, 767 (1985); Leonard W. Levy, *On the Origins of the Press Clause*, 32 U.C.L.A. L. Rev. 177, 206-07 (1984). Professor Meiklejohn's question is as relevant today as it was forty years ago: "The fact of governmental power is not, then, a proof of congressional power. . . . [T]he question before us is not, 'Has the government of the United States authority to nullify the First Amendment, wholly or in part.' Our very different question is, 'Has Congress that authority?'" Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. Chi. L. Rev. 461, 465 (1953). The Department of Justice has itself suggested this question. *See* Department of Justice, Office of Legal Policy, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause* 16-17 & nn. 24-25 (1986).

Kerr). Indeed, Hale suggested that the opening phrase in the First Amendment, "Congress shall make no law," might be "a sufficient prohibition" against further legislation. *Id.* at 1064. Representative Rogers observed that "any power to override a State and settle . . . the rights, privileges, and immunities of citizens in the several States . . . was left entirely for the courts." *Id.* at app. 133.

Even more to the point, in the enforcement debates of 1871, members of Congress expressly stated that Congress's general powers under Section 5 could not trump Congress's specific disability in the First Amendment. As Senator Bayard stated, "an implied power to Congress" could not overcome the Bill of Rights, which was "a distinct and affirmative inhibition of power to Congress." Cong. Globe, 42d Cong., 1st Sess. app. 242 (1871). Perhaps most presciently, Senator Stockton denied that the First Amendment could be enforced through Section 5:

> No act of Congress can authorize or make a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. Would it be appropriate legislation to enforce this amendment that Congress should pass an act prohibiting a State from doing so or directing it to do so? Congress is simply restrained from doing this itself.

Id. at 572.

Although Congress is disqualified from prescribing substantive First Amendment standards, this Court need not conclude in this case that Congress is barred from enacting any legislation to enforce First Amendment rights. It need only conclude that Congress may not exercise the *Morgan* power to

command state accommodation of religion when this Court has held that the states are not so constitutionally compelled. Nothing we have said here infringes Congress's power to correct state laws or practices that violate the First Amendment. Congress may continue to enforce the First Amendment through remedial provisions such as 42 U.S.C. § 1983. But neither the First Amendment nor Section 5 will support Congress's attempt to correct this Court and instruct the states. RFRA is simply beyond Congress's power.

CONCLUSION

The judgment of the court of appeals should be reversed.

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November 1996

(15)

Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

No. 95-2074

In The

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE SAN ANTONIO CONSERVATION SOCIETY, THE MUNICIPAL ART SOCIETY, AND THE NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, exceeds Congress's power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

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In The

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-2074

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE SAN ANTONIO CONSERVATION SOCIETY, THE MUNICIPAL ART SOCIETY, AND THE NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS AS *AMICI CURIAE* SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The San Antonio Conservation Society ("Society") is one of the oldest historic preservation and conservation advocacy organizations in the Nation. The Society is a 3,000-member organization funded primarily by fundraising events, real estate rentals, and admissions fees. Its purposes are to

preserve and to encourage the preservation of historic buildings, objects, places, and customs relating to the history of Texas, its natural beauty, and all that is admirably distinctive to the State; by such physical and cultural preservation to keep the history of Texas legible and intact; and to educate the public, especially the youth of today and tomorrow, with knowledge of inherited regional values.

Throughout its history, the Society has advocated and supported the maintenance of historical and cultural landmarks in correspondence, in statements in public fora, and in the state and federal court systems. The City of Boerne is adjacent to San Antonio, and the Society's Board of Directors has included members of St. Peter Church. The Society became involved in this case because of the Church's desire to demolish most of the building and retain only the towers and facade, which would be incorporated into a much larger new structure. The Church is of historical and cultural value to the community of Boerne. The building, a fine example of the "Mission Revival" style, echoes Mission Concepcion in San Antonio, as well as elements of Mission Carmel in California and the Alamo. The prominent site of the Church increases its contribution to the character of the City's historic district.

For more than a century, the Municipal Art Society ("MAS") has campaigned to preserve the best of New York City's past and to promote excellence in urban design and planning. The MAS is a private, non-profit membership corporation founded by a group of architects, artists, and civic leaders. Its advocacy efforts led to adoption of the Nation's first zoning ordinance in 1916, and the pioneering landmarks preservation law in 1965. The MAS has inspired the creation of many civic and preservation organizations in New York City and across the Nation. The MAS brings together civic groups, government, and private developers to share ideas, resolve differences, and inform the public. The MAS

maintains expertise in historic preservation and urban planning through its Board members and through committees that include approximately 75 professionals from the fields of preservation, architecture, landscape architecture, and urban planning.

The National Alliance of Preservation Commissions ("Alliance") is a non-profit public interest corporation established by a network of local preservation commissions in 1983. The Alliance's mission is to encourage architectural, cultural, and historic preservation in the United States by providing technical assistance to and advocating for local preservation commissions. The Alliance has 682 members in all 50 States, Puerto Rico, and the Virgin Islands, including 289 preservation commissions. In addition to its membership, the Alliance regularly communicates with more than 2,000 preservation commissions nationwide.

The conflict between Boerne and the Archdiocese of San Antonio is representative of many disagreements between *amici* and religious organizations over the destruction of historical and cultural landmarks. In passing the Religious Freedom Restoration Act (the "RFRA" or the "Act"), 42 U.S.C. § 2000bb, Congress stepped into the middle of these quintessentially local disputes. In so doing, Congress overstepped the limits of its constitutional authority.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The RFRA was designed to supersede a 1990 decision of this Court interpreting the Free Exercise Clause. The Act is extremely broad in scope, and applies to matters of purely local concern, including disputes over the future of historically and culturally significant places of worship.

The Constitution confers limited and enumerated powers on the federal government, and reserves all remaining powers

to the States or to the people. Although Congress justified the RFRA as an exercise of its power to enforce the provisions of the Fourteenth Amendment, the Act does not "enforce" any provision of that Amendment. Although the Court has sustained other statutes passed pursuant to Congress's power to enforce the Civil War Amendments, those cases are readily distinguishable.

The RFRA is repugnant to basic principles of federalism. Congress has expressly reserved the right to exempt its own legislation from the Act, which undermines its claim to be enforcing the First Amendment. Additionally, if the Act is constitutional, virtually no arena of state and local self-governance is immune from federal intrusion.

The federal system is designed so that States may experiment in local policy, within the boundaries of what is permitted by the Constitution. It is the judiciary's role to keep Congress from exceeding its enumerated powers. Congress overstepped its authority in enacting the RFRA, and thus the Act must be invalidated.

ARGUMENT

I. THE RFRA INTRUDES SUBSTANTIALLY INTO MATTERS OF LOCAL CONCERN.

A. The Act Grants Religious Entities A Sweeping Exemption From Constitutionally Permissible State And Local Laws.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability. The RFRA is "a direct response" to the Court's decision in *Smith*. *Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1361 (5th Cir. 1996). *See* S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993) ("[T]he purpose of this act [was] only to overturn the Supreme Court's decision in *Smith*.").

The Act "seeks to return the courts . . . to the approach they had taken before *Smith*," *Sasnett v. Sullivan*, 91 F.3d 1018, 1019 (7th Cir. 1996), *petition for cert. filed* (Oct. 29, 1996), by expressly announcing its design to "restore the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(b)(1).[1]

The RFRA decrees that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). An exception is provided if the government in question "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

The RFRA is breathtakingly broad in scope. By definition, "government" includes any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2(1). Moreover, the Act applies "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [its enactment]." 42 U.S.C. § 2000bb-3(a). The Act thus applies to all forms of law at every level of government.

In short, Congress has granted religious entities a sweeping statutory right to exemption from neutral and

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[1] As petitioner explains, *see* Pet. 15, the RFRA actually requires more of States and local governments than many pre-*Smith* cases.

generally applicable laws of all kinds, even though the Free Exercise Clause does not require such exemptions.[2]

B. The Act Is Likely To Have A Profound Impact On Efforts To Conserve Historic Places Of Worship.

The RFRA federalizes local disputes over the conservation of historic places of worship. Enforcement of historic preservation laws traditionally has been a matter of state and local concern. *See generally Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107-115 (1978). Although the details vary, the basic features of historic preservation laws are similar from community to community across the country. Typically, a state or local government body passes a law establishing a preservation commission and granting it authority to designate buildings or areas as historically significant. The law generally limits physical alternations of buildings or land so designated, in order to preserve their historic nature. For example, substantial alterations usually require special permission, which is given only if measures are taken to preserve the object's historic nature.

Many places of worship in this country are historically and architecturally significant, and these places often become the focus of commission attention. Religious organizations, however, often seek exemption from historic preservation laws. In some instances, the local commission agrees that a religious exemption is warranted; in others it disagrees. In some instances, an appeal to a city council or mayor is taken,

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[2] That Congress's special solicitude extends only to persons claiming a conflict due to a *religious* commitment, and not to persons facing a conflict due to an equally serious *secular* commitment, raises additional concerns about a possible affront to the Establishment Clause. *See* Christopher V. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 453-54 (1994).

with varying results. These disputes, which may evoke strong personal reactions from voices within the community, are quintessentially local in nature.[3] Resolution of these disputes through the political process reflects a balance between a region's cultural heritage and its religious community.

Prior to the enactment of the RFRA, religious organizations, armed only with the Free Exercise Clause, frequently lost when they carried disputes over zoning or historic preservation into federal court. *See, e.g., First Assembly of God v. Collier County, Fla.*, 20 F.3d 419, *modified*, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 730 (1995) (post-RFRA, without an RFRA claim); *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (post-*Smith* but pre-RFRA); *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990) (pre-*Smith*); *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) (pre-*Smith*). Armed with the RFRA, however, religious organizations now insist that Congress has granted them virtually complete exemption from historic preservation laws. In San Antonio, for example, that is precisely the position taken by counsel for the First Presbyterian Church before the San Antonio Historic and Design Review Commission. Thus, the RFRA may

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[3] *See, e.g.*, Lynell Burkett, *When Church and City Collide*, San Antonio Express News, July 28, 1996; Lynell Burkett, *Church vs. City: All Went Wrong*, San Antonio Express News, August 4, 1996; Christopher Anderson, *First Presbyterian Has History Entwined Deep in Alamo City*, San Antonio Express News, February 9, 1996; Ed Lane, *New Flap Raised About Homes Near Trinity Baptist*, San Antonio Light, May 30, 1991; Craig Donegan, *Church, Historical Group, May End Feud*, San Antonio Express News, May 31, 1991.

render local communities unable to prevent the destruction of historically important structures, and unable to enforce zoning laws against religious organizations.

II. CONGRESS'S POWER TO "ENFORCE" THE PROVISIONS OF THE FOURTEENTH AMENDMENT DOES NOT EXTEND TO DEFINING THE MEANING OF THE AMENDMENT'S SUBSTANTIVE PROVISIONS.

The "Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Because the Constitution is "an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833). The Tenth Amendment confirms that any power not expressly delegated to the United States is retained by the States. *See* U.S. Const. amend. X; *New York v. United States*, 505 U.S. 144, 156-57 (1992); *see also United States v. Lopez*, 115 S. Ct. 1624, 1646 (1995) (Thomas, J., concurring).

In enacting the RFRA, Congress invoked on Section 5 of the Fourteenth Amendment, which provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[4] U.S. Const. amend. XIV, § 5. The Court has held that the Due Process Clause of the Fourteenth Amendment incorporates the Free Exercise Clause

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[4] Congress did not purport to be legislating under its commerce power. *See* U.S. Const. art. I, § 8. Nor could it have. By its terms, the Act applies to any person, anywhere, burdened by any sort of law. It thus applies in situations that do not "substantially burden interstate commerce," as well as in those that do. *See generally United States v. Lopez*, 115 S. Ct. 1624 (1995) (Congress may not, under the cloak of the Commerce Clause, regulate practices that do not substantially burden interstate commerce).

of the First Amendment, which is thus applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Congress thus justifies the RFRA as a measure to "enforce, by appropriate legislation," the Free Exercise Clause.

The ordinary meaning of "to enforce" is "to compel observance of or obedience to." American Heritage Dictionary 432 (1971).[5] Thus, Congress has the power to enact legislation compelling the States to observe or obey the dictates of the Free Exercise Clause. It does not, however, have power to expand or contract the substantive requirements of that Clause.

The scope — and limits — of the power to "enforce" the substantive provisions of the Constitution may be illustrated by considering a different constitutional provision, the Ex Post Facto Clause of Article I, Section 10. The Ex Post Facto Clause provides that "No State shall . . . pass any . . . ex post facto law." To be sure, the Constitution does not provide that Congress has the power to enforce the Ex Post Facto Clause by appropriate legislation. But assuming that it did, any number of federal statutes would constitute legitimate exercises of that power. For example, Congress might enact legislation providing a means to overturn a conviction obtained by a State pursuant to an ex post facto law. Or Congress might enact a statute providing for civil damages against the offending state officials. Congress might also provide for the imposition of federal criminal sanctions against state officials who knowingly apply ex post facto laws. Or Congress might pass legislation providing for removal to federal court of any state criminal trial proceeding under an ex post facto law. *See*

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[5] *See also* Webster's Third New International Dictionary 751 (1993) ("to give force to," "to put in force: cause to take effect"); The Oxford English Dictionary E171 (1971) ("to compel the observance of") (definition 14); Random House Dictionary of the English Language 473 (1966) ("to put or keep in force; compel obedience to").

generally William Van Alstyne, *An Essay on the Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 Duke Law Journal ___, ___ n.24 (1996) (forthcoming). Thus, the power to enforce a constitutional provision by appropriate legislation is far from insignificant.

But the power to enforce the Ex Post Facto Clause plainly is *not* the power to expand or contract the substantive requirements of the Clause. The Ex Post Facto Clause prohibits application of a state criminal law to an act committed prior to enactment of the law, but it does not prohibit application of a law to an act committed immediately following enactment. *See generally Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Suppose Congress were to conclude that the Court's interpretation of the Ex Post Facto Clause is insufficiently protective of criminal defendants. Suppose further that Congress, acting pursuant to its assumed power to "enforce" the Ex Post Facto Clause, were to enact a statute mandating that "no criminal law shall be applied to any act committed prior to its enactment into law, *or for 30 days thereafter.*" Suddenly, despite the fact that the Supreme Court has definitively pronounced that the Ex Post Facto Clause does not prohibit a State from enforcing its criminal laws immediately upon passage, Congress has presumed to "enforce" that very same passage by *preventing* the State from doing just that. This is illogical, to say the least. Yet that is exactly what Congress has done in passing the RFRA.[6]

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[6] The same objection would apply if Congress attempted to allow the States to do what the Ex Post Facto Clause forbids, by, for example, enacting a statute allowing new criminal laws to be applied to acts committed up to 30 days before the statute was enacted.

III. THE *MORGAN* LINE OF CASES DOES NOT REQUIRE THE COURT TO UPHOLD THE RFRA.

A. *Morgan* Does Not Require The Court To Uphold The RFRA.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court sustained a federal statute enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. Although *Morgan* has been subjected to sustained judicial and scholarly criticism,[7] the case is readily distinguishable from this case, and thus the Court need not overrule *Morgan* in order to hold that the RFRA exceeds Congress's power under Section 5.

As an initial matter, the statute at issue in *Morgan*, § 4(e) of the Voting Rights Act of 1965, did not purport to supersede a decision of this Court. Section 4(e) generally precluded the States from imposing an English literacy requirement on voters who had completed the sixth grade in an "American-flag school" in which the predominant classroom language was not English. 384 U.S. at 643 n.1. Although the Court had earlier held that North Carolina's literacy requirement was not *on its face* violative of the Equal Protection Clause, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), the Court's opinion in *Morgan* was careful to note that *Lassiter* had not decided whether New York's literacy requirement, *as applied* to persons covered by § 4(e), violated the Equal Protection Clause. *See* 384 U.S. at 649; *see also Cardona v. Power*, 384 U.S. 672, 675 (1966) (Douglas, J., dissenting) (distinguishing *Lassiter* and concluding that New York's literacy requirement, as applied to Spanish-speaking

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[7] *See, e.g.*, *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting); Alexander Bickel, *The Voting Rights Cases*, 1966 Supreme Ct. Rev. 79, 95-102

persons, violates the Equal Protection Clause). In the RFRA, in contrast, Congress addressed the precise constitutional issue decided in *Smith*, and purported to supersede that decision by legislation. The posture of the RFRA thus differs substantially from that of the statute at issue in *Morgan*.

Four years after *Morgan*, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a majority of the Court struck down a provision of the Voting Rights Act that enfranchised 18-year-olds in state elections. In so doing, the Court suggested that *Morgan* does not extend to a statute such as the RFRA.

Justice Black's opinion in *Oregon v. Mitchell* emphasized that "Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'" 400 U.S. at 128. Justice Black linked the Section 5 enforcement power to the historical context of the Civil War Amendments. "Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race." 400 U.S. at 126. Accordingly, "[w]here Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Oregon v. Mitchell*, 400 U.S. at 129. It was largely the absence of a link with racial discrimination that led Justice Black to conclude that Congress lacked power to enfranchise 18-year-olds in state elections. *See id.* at 130.

Justice Harlan, dissenting in part and concurring in part, reaffirmed his position in *Morgan*, *see* 400 U.S. at 204 n.86, and argued that it is not up to Congress to define the scope of its own powers. Congress's view that it has the authority to enact particular legislation

> cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's

> assertion that: 'It is emphatically the province and duty of the judicial department to say what the law is.' It inheres in the structure of the constitutional system itself.

Id. at 204 (Harlan, J., concurring in part and dissenting in part) (citation omitted).

Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, added that *Morgan* "made clear that Congress could impose on the States a remedy for the denial of equal protection that elaborated upon the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion. But it is necessary to go much further to sustain § 302 . . . Unlike the statute considered in *Morgan*, § 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, *but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause.*" *Oregon v. Mitchell*, 400 U.S. at 296 (Stewart, J., concurring in part and dissenting in part) (emphasis added) (citation omitted). Justice Stewart concluded that Congress lacked such power. *Id.*[8]

In *City of Rome v. United States*, 446 U.S. 156 (1980), the Court expressed a similarly limited view of Congress's enforcement power under § 2 of the Fifteenth Amendment.

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[8] The Solicitor General suggests that *Oregon v. Mitchell* is distinguishable because the Constitution expressly confirms that the States have power to impose voting qualifications. *See* U.S. Br. in Opp. 14, citing U. S. Const. art I, § 2. The Solicitor General points out that the Constitution does not expressly grant the States similar power over local zoning matters. Of course, no such express confirmation of the state's power is required. *See* U.S. Const. amend. X.

The Court explained that Congress, "after making an extensive investigation, . . . determined that its earlier attempts to remedy the 'insidious and pervasive evil' of racial discrimination in voting had failed because of 'unremitting and ingenious defiance of the Constitution,'" that "[c]ase-by-case adjudication had proved too ponderous a method to remedy voting discrimination," and that when adjudication "produced favorable results, affected jurisdictions 'merely switched to discriminatory devices not covered by the federal decrees.'" 446 U.S. at 174, quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 314 (1966).

Cases such as *Oregon v. Mitchell* and *City of Rome* indicate that Congress's Section 5 power is limited in at least three respects. *See* William Van Alstyne, *An Essay on the Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 Duke Law Journal ___, ___ n.47 (1996) (forthcoming). *First*, Congress must identify a specific problem, such as the use of literacy tests. *Second*, Congress must exercise its special competence to determine relevant facts (*e.g.* the prevalence of literacy tests, the extent to which they are used as a device to accomplish unconstitutional discrimination, and the extent to which case-by-case adjudication provides an inadequate remedy for constitutional violations). *See Morgan*, 384 U.S. at 656; *Oregon v. Mitchell*, 400 U.S. at 131-34 (opinion of Black, J.); *id.* at 246-50 (opinion of Brennan, J., concurring in part and dissenting in part). *See also Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980). *Third*, Congress must confine itself to enacting a specific remedy for the problem it has identified. *See City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 490 (1989) ("Congress may identify *and redress* the effects of society-wide discrimination . . .") (emphasis added). Congress *may* remedy constitutional violations that are difficult to detect or prove; however, it is a logical

prerequisite that there be a constitutional violation. That, as always, is a question for the Court.

The RFRA plainly exceeds these limitations. Congress did not identify a specific constitutional problem, such as invidious use of facially neutral laws. Instead, Congress superseded a decision of this Court interpreting the Constitution, because it disagreed with that decision. Nor did Congress exercise its special fact-finding competence. *See* Joanne Brant, *Taking the Supreme Court At Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont.L.Rev. 5, 7 (1995). Finally, the RFRA also exceeds Congress's remedial power under Section 5. Rather than identifying a category of constitutional violations that cannot be remedied through case-by-case adjudication, Congress simply decreed that religious organizations shall be entitled to a blanket exemption from *all* state and local laws.

B. The Power To Enforce The Other Civil War Amendments Has Not Been Construed Broadly Enough To Support The RFRA.

Morgan and *Oregon v. Mitchell* considered Congress's power under Section 5 of the Fourteenth Amendment. *City of Rome* addressed and sustained the constitutionality of a statute enacted pursuant to nearly identical language in Section Two of the Fifteenth Amendment; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Runyon v. McCrary*, 427 U.S. 160 (1976), addressed, and in each case sustained, statutes enacted pursuant to similar language in the Thirteenth Amendment. As noted above, *City of Rome* concerned a "proper" exercise of the *Morgan*-power — that is, Congress exercised its special factfinding competence to identify a practical problem and enacted a legislative remedy for that problem. The statutes sustained in *Jones* and *Runyon* (both decided after *Morgan*) are like and yet unlike the *Morgan* statute. Regardless, they are wholly *unlike* the RFRA.

The statute at issue in *Jones* provided that "all citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. The statute at issue eight years later in *Runyon v. McCrary* prohibited racial discrimination in the making and enforcing of private contracts. 42 U.S.C. § 1981. These statutes are, to be sure, broad and general — in that respect more like the RFRA than like the *Morgan* statute. At the same time, they fall squarely within the historical context of the Civil War Amendments, our nation's experience with the institution of slavery, and its "badges and incidents," which are implicated by Section 1 of the Thirteenth Amendment. *See Civil Rights Cases*, 109 U.S. 3 (1883). The Court's elaborate discussion in *Jones* of the *substantive* section of the Thirteenth Amendment, the history of "Black Codes," and the systematic exclusion of black Americans from white communities, reinforces the conclusion that, like the statutes at issue in *Morgan* and *City of Rome*, these statutes were *remedial* in nature. *See Jones*, 392 U.S. at 426-37; *id.* at 444-47 (Douglas, J., concurring).

The RFRA has little in common with any of these statutes, and thus cases decided under the Thirteenth and Fifteenth Amendments do not support the proposition that the RFRA is within Congress's power under Section 5 of the Fourteenth Amendment.

IV. THE RFRA IS CONTRARY TO BASIC PRINCIPLES OF FEDERALISM.

A. By Expressly Reserving The Right To Exempt Itself From The RFRA, Congress Has Undermined Any Argument That It Is Enforcing The First Amendment.

The RFRA expressly provides that "Federal statutory law adopted after November 16, 1993 is subject to this chapter *unless such law explicitly excludes such application by*

reference to this chapter." 42 U.S.C. § 2000bb-3(c) (emphasis added). No such privilege is accorded to the States or local governments. Congress plainly lacks power to exempt itself from the requirements of the Free Exercise Clause. By reserving the possibility that the RFRA will not apply to federal legislation, Congress has implicitly acknowledged that RFRA is not merely enforcing the requirements of the Free Exercise Clause.

Congress's reservation of power to exempt itself from the RFRA, while according no such exemption to the States, offends basic principles of federalism. *See EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Burger, J., dissenting, joined by Rehnquist, Powell, and O'Connor, JJ.) (suggesting that Congress has no Section 5 power to forbid practices that it authorizes the federal government to engage in). The RFRA would, for example, permit Congress to enact drug control laws that are not subject to the RFRA, while forbidding an identical state law, even though the state law comports with the requirements of the Constitution.

B. If The RFRA Is Within Congress's Power, There Is Virtually No Arena Of State Or Local Governance That Is Immune From Federal Interference.

If the RFRA is a constitutional exercise of Congress's power under Section 5, it follows that Congress has effectively unlimited power to interfere with state and local government under the guise of "enforcing" the Fourteenth Amendment. Two examples of RFRA-type statutes, one concerning obscenity and the other concerning the minimum size of juries, illustrate this point. *See* William Van Alstyne, *An Essay on the Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*," 46 Duke Law Journal ___ (1996) (forthcoming) (providing a series of examples, including the two elaborated below).

The Court has determined how far the States may go, consistent with the First and Fourteenth Amendments, in enacting anti-obscenity laws and ordinances. *See Miller v. California*, 413 U.S. 15 (1973). If a film is obscene under the *Miller* criteria, it is not entitled to First Amendment protection, and state or local authorities can ban it. But if Congress were to conclude that *Miller* is insufficiently protective of free expression, it would be free under the RFRA theory of Section 5 to "enforce" its view of the First Amendment by decreeing that States and local communities may not censor materials that would constitute "obscenity" under the *Miller* standard. Declaring itself to be "augmenting" the values of the First Amendment, Congress could step in and dictate what the individual community must permit — despite this Court having said that the community is complying fully with the First Amendment. Surely that is not what Section 5 was intended to permit. As the Court has noted, "it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970).

A second example confirms the conclusion that Congress has exceeded its Section 5 power. This Court has held that the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, requires that no criminal trial jury may consist of fewer than six jurors. *See Ballew v. Georgia*, 435 U.S. 223 (1978). Thus, a State that chooses to empanel eight-person juries for all felony trials complies fully with the requirements of the federal Constitution. If Congress were to decide that *Ballew* somehow is insufficiently protective of a criminal defendant's rights to a fair trial and due process of law, Congress might, under the RFRA theory of Section 5, enact a statute requiring the States to empanel twelve- or fourteen-person juries, in their own courts, in the enforcement of their own criminal

statutes, despite the fact that their prior practice comported fully with the Constitution. This cannot be consistent with the Constitution, which "has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

C. Congress Lacks Power To Enact Legislation Defining The Substantive Scope Of Incorporated Rights, Including In Particular The First Amendment.

There can be no dispute that "the Civil War Amendments . . . worked a dramatic change in the balance between congressional and state power over matters of race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989). But *Morgan* and the Voting Rights Act cases speak only to Congress's power vis-à-vis the Equal Protection Clause.

Even if the Court were to conclude that Congress has power to define the substantive scope of that Clause, it should not take the additional step of concluding that Congress has the power to define the scope of incorporated rights. The Bill of Rights was originally directed to the federal government, and only later applied to the States. It would be a strange reversal of this history if the Congress were now permitted to define the substantive scope of those rights. Consequently, it is far from clear that Congress has "the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters." *Hutto v. Finney*, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting); *see also Hamilton v. Schriro*, 74 F.3d 1545, 1563 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996) (McMillian, J., dissenting) ("An argument could be made, based on both historical perspective and the logic of the doctrine of

incorporation itself, that Congress's power to enforce incorporated rights under § 5 should be circumscribed.").

That argument applies with particular force to the First Amendment, which is expressly framed as a *limitation* on Congressional power. "Congress shall make *no law*," the First Amendment provides, "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. No other provision in the Bill of Rights is framed this way. Accordingly, Congress's Fourteenth Amendment power to "enforce" the First Amendment may be viewed as more circumscribed than its power to "enforce" the other incorporated amendments, which do not begin with the command that "Congress shall make no law."

V. THE GROUNDWORK HAS BEEN LAID FOR THIS COURT TO INVALIDATE THE RELIGIOUS FREEDOM RESTORATION ACT.

A. The Federal System Permits The States To Experiment In Local Policy, Within The Boundaries Established By The Constitution.

The Constitution ratified by the States was carefully drafted to protect them from undue intrusion by the federal government. Thus, the instrument provides the federal government only with a well-defined list of powers. The States retain all remaining powers, reflecting the fact that the States came into the Union as independent and complete entities. *See Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

Although the States retain all powers not expressly ceded to the federal government, the Constitution provides for some restraints on the States, both in the original document (*e.g.*, the Ex Post Facto Clause of Article I, Section 10) and in the amendments (*e.g.*, the Eighth Amendment, which constrains

the States by virtue of its incorporation in the Due Process Clause of the Fourteenth Amendment). If a State, acting pursuant to its retained power, contravenes none of these provisions, it is free to do as it pleases. That is the message of the Tenth Amendment. As Justice Brandeis pointed out earlier in the century, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The RFRA effectively prevents States and local communities from the experimentation that is a fundamental corollary to our being a Union of indestructible states. If San Antonio should wish to preserve for future generations religious buildings dating from the 18th and 19th centuries that reflect our regional heritage, and New York should choose to remodel such buildings to accommodate expanding congregations, and if both scrupulously follow the dictates of the Constitution, each is free to do as it pleases. It is not Congress's place, in our constitutional system, to say otherwise.

B. It Is The Judiciary's Role To Keep Congress Within Its Enumerated Powers.

As Judge McMillian of the Eighth Circuit pointed out, "the language of [the congressional findings that accompany the act] portrays Congress . . . as a super-Supreme Court." *Hamilton v. Schriro*, 74 F.3d 1545, 1566 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996) (McMillian, J., dissenting). But ours is a system of separated powers, and that is not the

role of Congress.[9] "It is emphatically the province and the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And it is the role of the judiciary to keep Congress within its enumerated powers. *See id.* at 176 ("The powers of the legislature are defined and limited. . . . To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"). Recent decisions of this Court have invalidated legislation that oversteps Congress's powers under the Constitution. *See, e.g.*, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 115 S.Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992). The RFRA, like the statutes at issue in those cases, should be invalidated because it exceeds Congress's power under the Constitution.

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[9] *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our [decisions respecting what the states may or may not do consistent with the Fourteenth Amendment] would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.").

CONCLUSION

The judgment of the court of appeals should be reversed.

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Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

(16)

No. 95-2074

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI* STATES OF OHIO, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, THE COMMONWEALTH OF PENNSYLVANIA, AND THE TERRITORIES OF AMERICAN SAMOA, GUAM AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONER, CITY OF BOERNE, TEXAS

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QUESTION PRESENTED

DOES THE RELIGIOUS FREEDOM RESTORATION ACT EXCEED CONGRESSIONAL AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF AMICUS INTEREST

A. Introduction.

Amicus State of Ohio and 15 other Amici States and Territories write to urge the Court to reverse the decision below and in the process to declare The Religious Freedom Restoration Act ("RFRA" or the "Act"), 42 U.S.C. 2000bb, *et seq.*, unconstitutional as applied to the States. In doing so, they join at least four other States -- California, New York, Illinois, Wisconsin -- that have already challenged the validity of RFRA in separate actions. *See, e.g., Rouser v. White*, 1996 U.S. Dist. LEXIS 16172 (E.D. Cal. 1996); *Bass v. Grottoli*, 1995 U.S. Dist. LEXIS 13906 (S.D.N.Y. 1995); *Van Dyke v. Washington*, 896 F.Supp. 183 (C.D. Ill. 1995); *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996).

The Amici States do not make this request lightly. RFRA tries to advance a commendable goal -- religious liberties -- and does so at the end of a legislative process that is as deserving of respect as each of the State legislative processes that it seeks to replace. But in the last analysis the pathmarking means used to further this legislative scheme exceed Congress's enumerated powers and disregard vital principles of federalism.

In the three short years since RFRA was enacted, it has disrupted several core functions of State governance. Whether it be running prisons, educating children, defining criminal laws, or exercising other police powers, RFRA has undermined the traditional discretion given to the States in these areas. Because the plain language of the Act enshrines the "least restrictive means" test as the across-the-board minimum for free exercise claims, it is difficult to be hopeful about regaining State authority over these areas any time

soon or about ultimately confining the damage to these areas alone.

No less promising is the impact that this theory of congressional authority could have on future federal-state relations. If blessed by the Court, this expansive theory of congressional authority -- applicable any time Congress chooses to protect constitutional "values" covered by the due process or equal protection clauses -- would have no fathomable stopping point. It would open most, if not all, areas of State governance to federal regulation, threatening to destroy the Constitution's most important liberty safeguard -- a distribution of power among the States and a balance of power between the national and State governments. *See New York v. United States*, 505 U.S. 144, 187 (1992) (the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day").

B. RFRA Has Substantially Impeded The States' Efforts To Run Their Prison Systems.

Today the status of RFRA is important to the States for one essential reason: The Act has dramatically increased the volume of inmate litigation and created unique burdens for prison administrators, States' Attorneys General and other State officials. Running a safe, secure and orderly prison system is one of the most difficult tasks consigned to State governments, and represents one of the States' core sovereign functions. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Yet RFRA encroaches on the States' authority to handle this responsibility in several important respects.

First, the sheer number of lawsuits generated by RFRA has itself placed a unique burden on State government. The Act has spawned a remarkable wave of inmate litigation in the years since it was passed. Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges. Even this figure, of course, understates the volume of litigation -- first, because it only counts decided cases (Ohio, to use one example, is defending more than 60 other pending actions); second, because it fails to count unreported decisions; and third, because it does not account for the fact that many cases are class actions.

The litigation wave generated by RFRA disrupts State prisons and State prison administrators in many ways. As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion. Many of the cases, moreover, involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, they are now being litigated anew in every corner of the country.

For like reasons, RFRA lawsuits are expensive. New attorneys and experts must be hired to defend them; depositions and other discovery must be taken to respond to them; and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings. Though it is too early to quantify the total costs to the States of RFRA, there can be little doubt that it truly is -- and will be -- an unfunded federal mandate.

Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation. They must investigate the "religious" nature of each claim and the "religious" necessity to each inmate of bringing the claim. Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands. *See* Appendix B and C, Brief of Amici States in Support of Certiorari. Not surprisingly, litigation of this sort places a heavy tax on prison administration. *See generally* R. Engel & S. Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoner's Rights and Violence*, 7 Harvard Journal of Law & Public Policy 413 (1994).

Second, RFRA exacerbates the challenges of running prisons by creating new security and administrative threats. It does so by allowing violent inmate gangs, racist organizations, drug distributors and like-minded groups to shroud illicit activity under the cover of "religious" belief.

Already the Act has been used by racist inmates attempting to cloak their agendas in "religion," making it more difficult for corrections officials to limit the disruption and other consequences of such activity. *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996) (racial segregation sought in the name of religious belief); *George v. Sullivan*, 896 F.Supp. 895 (W.D. Wis. 1995) (authority to distribute hate literature sought in the name of religious belief). Other inmates have attempted to justify possession of drugs in prison under RFRA. *See, e.g., United States v. Meyers*, 906 F.Supp. 1494 (D.Wyo. 1995), *aff'd*, 95 F.3d 1475 (9th Cir. 1996) (inmate claimed that distribution of drugs was permitted by his membership in the Church of Marijuana). By forcing prison officials to relax clothing, hair and other restrictions,

RFRA also has facilitated efforts to use drugs, distribute weapons or engage in other dangerous activities in the prisons. *See, e.g., Rust v. Clarke*, 883 F.Supp. 1293 (D. Neb. 1995), *aff'd*, 84 F.3d 841 (8th Cir. 1996) (inmate group sought swords and materials for burnt offerings); *Emel v. Mensinger*, 1996 U.S. Dist. LEXIS 13498 (E.D. Pa. 1996) (satanists claimed a right to burn bibles). The Act also has been used by inmate gangs to attempt to frustrate prison restrictions on the use of long hair, medallions and "colors" as gang identifiers. *See Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 193 (1996); *Abordo v. Hawaii*, 938 F.Supp. 656 (D. Haw. 1996); *Diaz v. Collins*, 872 F.Supp. 353 (E.D. Tex. 1994).

Even when officials defeat these attempts to hide illicit activity behind RFRA, the effort consumes significant staff time -- time diverted from finding dangerous contraband, stopping inmate-on-inmate predation, or providing rehabilitative services to inmates. Preliminary results of a national survey together with press reports indicate that prison staff have become hesitant to exercise traditional authority in this area for fear of running afoul of RFRA. This result echos the scholarly research on the burdensome effect of judicial intervention on prison operations. *See* Brief of State Amici Curiae In Support of Certiorari, A-12, n.3; D. Kilgoren & C. Hall, *Prison Officials Seek to Balance Security Needs, Religious Needs*, Washington Post, Oct. 7, 1996, at B1; C. Hall, *Ring Used Religion as Cover to Sneak Drugs Into Lorton*, The Washington Post, Sept. 27, 1996, at A1; Engel & Rothman, *supra*, at 430-432.

Third, and perhaps most frustrating of all, RFRA has undermined the very goal it was designed to advance -- sensitivity to the religious beliefs of prison inmates. The twin increase in lawsuit filings and demands for

accommodation diverts chaplains and other religious services personnel from their core mission of delivering religious services to prisoners. In addition, inmates adhering to differing faith groups, and even to differing denominations and sects within a faith group, often make conflicting demands, posing severe logistical challenges to prison staff. Finally, the unprecedented volume of inmate demands under RFRA has undermined the ability of religious services personnel to maintain the type of "pastoral" relationships with inmates necessary for the effective delivery of religious services. *See* Appendices B and C, State Amicus Brief in Support of Certiorari. Some prison systems, such as the Colorado and Oklahoma Departments of Corrections, have become so frustrated with the impact of RFRA that they have discontinued all State-funded chaplaincy programs. *Id.* at A-12, n. 3, A-15 - A-16.

C. RFRA Has Undermined Other Traditional State Police Powers as Well.

By dictating a universal strict scrutiny standard for clashes between individual religious liberty claims and collective security needs, RFRA also disrupts other core State police powers. In the area of education, for example, RFRA has generated a raft of unusual lawsuits. It has subjected such matters as the selection of songs performed by high school choirs, the enforcement of minimal educational standards and the disciplining of errant faculty to strict federal review. *See Bauchman v. West High School*, 900 F.Supp. 254 (D. Utah 1995); *Battles v. Anne Arundel County Bd. of Education*, 904 F.Supp. 471 (D. Md. 1995); *Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996). The Act has even sparked litigation over whether young children have a federal right to carry daggers to school. *See Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

Likewise, the RFRA mandate has made it more difficult for state and local governments to maintain public safety. The Act has generated extensive litigation over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations. *See Thiry v. Carlson*, 887 F.Supp. 1407 (D. Kans. 1995), *aff'd*, 78 F.3d 1491 (10th Cir. 1996); *Osborne v. Power*, 890 S.W. 2d 570 (Ark. 1994); *State v. Miller*, 202 Wis.2d 56, 549 N.W.2d. 235 (Wis. 1996); *State v. Bontrager*, No. 6-95-16 (Ohio Ct. App. Hardin Co., Oct. 18, 1996). Whether the States ultimately defeat these claims of course is only half the matter; the fact that Congress has seized authority to legislate in these areas and compelled States to divert substantial resources in defending actions under the legislation itself encroaches on State sovereignty.

SUMMARY OF ARGUMENT

In enacting RFRA, Congress assumed unique power. It claimed that section five of the Fourteenth Amendment allows it to enforce section one as the Court sees it *or* as Congress sees it. Surveying a century of free exercise decisions by the Court, Congress chose to make binding on the States the standard of review that the Court has applied in assessing some generally applicable laws impinging on religious liberties (strict scrutiny), while rejecting the standard that the Court has applied in assessing most such claims (reasonableness).

The statute thus in no way does the normal things that section five laws do: Prohibit specific laws violating the Fourteenth Amendment, *see Ex Parte Virginia*, 100 U.S. 339 (1880); prohibit specific laws that have been used to violate the amendment in the past, *see Katzenbach v. Morgan*,384

U.S. 641 (1966), *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); establish a cause of action for violations of the amendment, *see* 42 U.S.C. 1983; provide costs and fees to individuals who successfully establish such violations, *see* 42 U.S.C. 1988; or create damages actions against States for individuals who successfully establish such violations, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). What motivated Congress in passing RFRA was something different. It was not State recalcitrance in adhering to the requirements of the free exercise clause; it was congressional disagreement with the clause's terms. That is why the title of the Act and the statute itself say that Congress is "restor[ing]" the strict scrutiny test, and that it why Congress claimed it passed the legislation in order "to provide statutory protection for a constitutional *value* when the Supreme Court has been unwilling to assert its authority." H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993) (emphasis added). This novel theory of congressional authority has no foundation in precedent or logic.

1. The text and structure of the Fourteenth Amendment, the framers' debates about the amendment and the case law construing section five require Congress to anchor section five legislation to violations of section one.

a. The text of section five grants Congress authority "to enforce" the provisions of section one. It thus gives Congress power only to compel obedience to the equal protection and due process clauses of section one. It does not empower Congress to redefine the constitutional guarantees or what comes to the same thing -- pile prophylactic rules on top of prophylactic rules in order to protect the *values* underlying the guarantees. As the text makes clear, a fundamental predicate to all congressional authority under section five is a violation of the Fourteenth Amendment. It makes little sense to speak of power to

compel adherence to a constitutional requirement, when that power is being exercised to authorize legislation that has meaning only as applied to those States that have *obeyed* the guarantee. When the framers wished to grant broader regulatory power to Congress, they knew how to do so. *See* Art. I, § 8, (granting power "to regulate . . . Commerce between the States"). They simply did not exercise that authority here, and their decision should be respected.

b. The debates over the Fourteenth Amendment confirm that the words mean what they say. When Congress had an opportunity to adopt a broader version of section five, which was offered in February 1866, it rejected the proposal. To the Amici States' knowledge, moreover, no participant in the debates embraced the interpretation of the Fourteenth Amendment offered here -- namely, that section one incorporates most of the first eight amendments *and* that section five allows Congress to enforce both the meaning of the amendments and any *values* underlying them. Such an amendment could not have been ratified in 1870; it would not be ratified today.

c. Consistent with the text and the framers' debates, the case law construing section five requires Congress to anchor its authority to prior or ongoing violations of the Fourteenth Amendment. Whether one consults older cases, *see Ex Parte Virginia*, 100 U.S. 339 (1880), *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Civil Rights Cases*, 109 U.S. 3 (1883), or newer ones, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), *Oregon v. Mitchell*, 400 U.S. 112 (1970), *City of Rome v. United States*, 446 U.S. 156 (1980), the Court has long required Congress to link section five legislation to prior or ongoing violations of the Fourteenth Amendment. *Dicta* in *Morgan* to the contrary is just that, and has never received the essential support of five members of the Court.

2. Measured against these criteria, Congress has exceeded its authority in enacting RFRA. The federal law plainly does not prohibit *ongoing* violations of the Fourteenth Amendment. Congress did not claim -- and could not have claimed -- that RFRA compels States to obey the dictates of the free exercise clause today and tomorrow. Under the clause, generally applicable and facially neutral laws do not receive strict scrutiny. *See Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S.Ct. 2217 (1993). Nor does RFRA in any way remedy *prior* free exercise violations. It simply creates a standard of review for assessing *all* free exercise claims, not just those concerning State laws that have been used to violate constitutional rights, but any and all laws that substantially intersect with religious liberties.

3. Adopting the RFRA theory of section five authority, moreover, would transform the federal government from one of limited powers to one of unlimited powers. If Congress is allowed to enforce constitutional *values*, as opposed to constitutional *violations*, there is no stopping point to its authority. All rational federal legislation would protect the values underlying the equal protection clause, particularly the requirement that State laws need to be rational. So too would federal legislation that simply requires State laws to be a little more rational -- for example, "substantially rational." It also takes little imagination to use this version of section five authority to protect an assortment of values covered by the due process clause. Congress could federalize all law enforcement in the name of the Fourth and Fifth Amendments, all punishment and all definitions of crime in the name of the Eighth Amendment, and all speech in the name of the First Amendment. Because all legislation in one way or another addresses the age-old conflict between the values of security and liberty, this theory makes section five

anything but an enumerated federal power. Indeed, left intact, the RFRA theory of congressional power not only threatens the foundations of our federalism system but it also threatens the vitality of the Court's landmark decisions in *New York v. United States*, 505 U.S. 144 (1992), *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995), and *Seminole Tribe v. Florida*, ____ U.S. ____, 116 S.Ct. 1114 (1996).

ARGUMENT

At the outset, it is important to clarify the breadth of section five power that Congress has assumed in this instance. Enacted in 1993, RFRA was expressly designed to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), and to "restore" the strict scrutiny test that ostensibly was applicable to claims arising under the Free Exercise Clause of the First and Fourteenth Amendments to the United States Constitution. In Congress's view, because section five empowers the federal government "to provide statutory protection for a constitutional *value* when the Supreme Court has been unwilling to assert its authority," H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993) (emphasis added), the meaning of the constitutional guarantee does not limit congressional power. As RFRA itself demonstrates, moreover, this broad section five power purportedly extends to *all* values protected in whole or in part by the equal protection and due process clauses, including those guarantees of the Bill of Rights that have been selectively incorporated and made applicable to the States.

Congress is wrong. And so was the lower court in blessing this expensive theory of section five power. Neither the text of section five, the structure of the Fourteenth Amendment, the ratification debates, nor the case law construing the provision supports this view. Accordingly,

the Court should invalidate RFRA as applied to the States, and clarify that section five legislation must be tied to violations of the Fourteenth Amendment.

I. Section Five Legislation Must Be Linked To Violations Of The Fourteenth Amendment.

A. The Text and Structure Of The Fourteenth Amendment Establish That Congress's Section Five Authority Must Be Tethered To Violations Of Section One.

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
>
> "Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

Section five combines a broad power (to pass "appropriate legislation") with a broad limitation on that power (to do so only when "enforc[ing] . . . the provisions of this article"). Old and new dictionaries confirm that the verb "enforce" is a confining one. It just empowers Congress to compel "obedience" to something -- here, to require the States to adhere to the prohibitions contained in the equal protection and due process clauses. *See* Webster, *An American Dictionary of the English Language* (1869) ("1.

To put force upon; to force; to constrain; to compel; as to *enforce* obedience to commands."); Webster, *An American Dictionary of the English Language* (1878) (same). *See also A Dictionary of Law* (1893) 466 ("To constrain, or compel; to give effect to: as, to enforce an order of court."); *Dictionary of Words and Phrases* (1899) 322 ("To cause to have force and effect. To compel obedience to."); *The Oxford English Dictionary* (1933) Vol. III, 171 ("To compel the observance of (a law); to support by force (a claim, demand, obligation)."); *Webster's New International Dictionary* (1939) 847 ("To force; constrain; compel; as, to *enforce* obedience.").

Nothing about the word "enforce," the definitions of it, or the sentence in which it appears, offers any hint that the term includes the authority to "define," to "amend," or to "expand" the constitutional rights guaranteed by the Fourteenth Amendment. On the contrary, such a construction makes little sense. How can it plausibly be said that Congress is requiring obedience to a prohibition (the free exercise clause) when it passes a law that is meaningful only as applied to those who have obeyed the provision?

Other provisions of the Constitution deploy enforcement clauses, and in each instance appear to use "enforce" similarly -- simply to require adherence to the constitutional provision, not to redefine it. *See* U.S. Const. amends. XIII, XIV, XVIII, XIX, XXIII, XXIV and XXVI. Still other clauses indicate that the framers knew how to express themselves differently when they had something else in mind. When they wished to combine in Congress a broad power both to define and enforce federal requirements, they called it the power "to regulate." *See, e.g.*, Art. I, § 8 (granting Congress power "to regulate Commerce . . . among the several States"). Having failed to use this

touchstone of broad congressional authority here, their decision should be respected.

In the end, "to enforce" simply means to require obedience to -- no more no less. The words thus should be given the only content they contain: The power "to enforce. . . the provisions of this article" means the power to make the States follow these provisions, not the power to define the rights themselves or to regulate under them generally. Unless anchored to a violation of the Fourteenth Amendment, in short, Congress has no authority under section five.

B. The Framers' Debates Confirm that a Constitutional Wrong Must Exist Before Congress May Exercise Its Section Five Power.

The drafting and debating history of section five confirm that the words mean what they say. While page limitations prohibit thorough coverage of the exhaustive scholarship on this issue, two features of the debates deserve emphasis. First, Congress had an opportunity to approve a proposed amendment that would have supported (or at least begun to support) the interpretation advanced here. In February 1866, Representative Bingham of Ohio proposed the following language:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). This early proposal might have begun to establish a grant of power to Congress substantively to legislate civil rights, and possibly even to define them. The proposal, however, was rejected. Ultimately section five just established a congressional power to enforce the amendment's prohibitions against recalcitrant States, not a plenary power to federalize Congress's own interpretation of the amendment.

Second, while the debates arguably remain ambiguous on whether the Fourteenth Amendment was intended to make the first eight amendments applicable in whole or in part to the States, *compare Adamson v. California*, 332 U.S. 46, 63-64 (1947) (Frankfurter, J., concurring); with *id.* at 74-75 (Black, J., dissenting), not one of the framers simultaneously advanced the two suggestions embraced here. In other words, no one (to the State Amici's knowledge) thought that the provision made the first eight amendments applicable to the States *and* granted Congress plenary authority to place its own interpretive gloss on these and the other guarantees of the Fourteenth Amendment. It takes little historical imagination to anticipate the congressional opposition to such a proposal, let alone the implausibility of its being ratified by the requisite three-fourths of the States.

C. The Court's Section Five Holdings All Require Section Five Legislation To Be Tied To Constitutional Wrongs.

The Court's section five holdings all respect the textual limitation that the phrase "to enforce" places on congressional authority in this area. Even with respect to the central evils addressed by the Fourteenth Amendment -- race and voting -- the Court has long required congressional

authority to be linked to actual violations of the underlying amendment.

Early opinions of the Court, written against the immediate backdrop of the ratification debates, confirm that section five legislation must be tethered to Fourteenth Amendment violations. For example, in *Ex Parte Virginia*, 100 U.S. 339 (1880), the Court upheld application of civil rights legislation to a state trial court judge who excluded jurors on account of race. In doing so, the Court made clear that section five was intended only to "enforce submission to the prohibitions" of the amendment, *id.* at 346, not to enlarge them. Thus, while section five "gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment," the Court made clear that it "is but a limited authority" that "extend[s] only to a single class of cases." *Id.* at 348.

To the same effect is *Strauder v. West Virginia*, 100 U.S. 303 (1880), which upheld federal legislation permitting removal of a civil rights claim from state to federal court. Again, the enforcement legislation did not enlarge the protections of the Fourteenth Amendment; it simply gave victims a mechanism for removing such claims to a neutral federal forum. Only "[i]f . . . the States did not conform their laws to [the Fourteenth Amendment's] requirements" was Congress "authorized to enforce" them by suitable legislation. *Id.* at 307 (quotation omitted). The point of section five, the Court explained, was not to authorize Congress to place its own gloss on the amendment but to address the problem that "prejudice" in the States could make the guarantees a dead letter. *Id.* at 309. Indeed, "[w]ithout the apprehended existence of prejudice that portion of the amendment would have been unnecessary." *Id.*

A few years later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court considered whether Congress had authority to enact the Civil Rights Act of 1875 which prohibited discrimination in inns, public conveyances, theaters and other public places of enjoyment. In invalidating the law, the Court held that section five is purely remedial in scope.

> [T]he last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. *This is the legislative power conferred upon Congress, and this is the whole of it.* It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action, of the kind referred to.

Id. at 11 (emphasis added). In determining that the enforcement power had to be "remedial" or "corrective" in nature, the Court acknowledged that enforcement "legislation may and should be provided in advance to meet the exigency when it arises." *Id.* at 13. But in doing so the Court warned that the legislation had to "be adapted to the mischief and wrong which the Amendment was intended to provide against." *Id.* at 13. It "cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be . . . to make Congress take the place of the State Legislatures and to supersede them." *Id.* *See id.* at 13-14.

More recent decisions of the Court reaffirm these principles. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court addressed the validity of voting rights legislation enacted in response to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 309. Concluding that prior remedies had been "unsuccessful," Congress replaced them with "sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." *Id.* *See generally id.* at 309-15, 328, 334-35, 337. In upholding the law's suspension of literacy tests, the Court acknowledged that it had recently upheld such tests in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). But it held that this does not end the matter: Facially neutral literacy tests may be -- and had in the past been -- "instituted with the purpose of disenfranchising Negroes." *South Carolina*, 383 U.S. at 333-34. Recognizing that "the Fifteenth Amendment has clearly been violated" through the imposition of literacy tests in the past, the Court upheld the remedial legislation. *Id.*

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court reached a similar result -- upholding a federal literacy test ban under the enforcement clause of the Fourteenth Amendment. Again, the Court addressed a federal ban that covered State laws that were generically approved in *Lassiter*. And again the Court approved the law after concluding that it "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications." *Id.* at 653-54. Thus, only after reciting evidence that the English literacy requirement had been used as "an invidious discrimination in violation of the Equal Protection Clause," *id.* at 656, did the Court conclude that Congress had authority to enact the section five legislation, *id.* at 654-56.

Nor do other passages in *Morgan* change things. *See* 384 U.S. at 648-654. Although certain portions of the opinion state broadly that Congress may "exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," *id.* at 651, they do not establish that Congress has discretion to determine what constitutes a Fourteenth Amendment violation or to legislate in spite of, as opposed to because of, constitutional violations. Otherwise, the Court's repeated references to the "invidious discrimination" caused by the prior use of literacy tests, *see id.* at 653-54, 656, make little sense. At any rate, neither these nor any other passages of the opinion pretend to overrule the Court's prior decisions, which all establish that Congress must take the Constitution as it finds it.

Later cases are to the same effect. They each contain similar findings concerning past or ongoing violations of the Fourteenth Amendment. *See Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) (Black, J., writing for Court) (noting "long history" of discriminatory use of literacy tests); *id.* at 216-17 (Harlan, J. concurring) (sufficient evidence of racial discrimination with literacy tests); *id.* at 282-84 (Stewart, J., concurring, joined by Blackmun, J. and Burger, C.J.) ("nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country"); *City of Rome v. United States*, 446 U.S. 156 (1980) (incorporating prior findings of racial discrimination in case law and refusing "to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from [undoing] or [defeating] the rights recently won by Negroes") (quotations omitted).

All things considered, the text of section five, the history behind the provision and the case law construing it establish this: Before Congress may invoke its enforcement authority under section five, there must be a prior or ongoing constitutional wrong. And, while the egregiousness of the wrong may extend Congress's remedial discretion, *see South Carolina*, 383 U.S. at 334 ("exceptional conditions can justify legislative measures not otherwise appropriate") (citation omitted), a constitutional wrong is -- and always has been -- a preliminary requirement.

II. RFRA Exceeds Congressional Authority Under Section Five.

Measured against these requirements, RFRA is plainly invalid. Any power that Congress has under section five to enforce the Fourteenth Amendment simply does not go this far -- to an Act that does not correct specific legislation but attempts to erect a standard of review for courts assessing future legislation, and to an Act that does not remedy a constitutional wrong but attempts to create a quasi-constitutional right.

A. RFRA Does Not Correct Ongoing Free Exercise Violations.

As a matter of plain meaning and common sense, there is no plausible argument that RFRA was enacted to prohibit *ongoing* violations of the Fourteenth Amendment -- specifically the free exercise clause of the First Amendment. According to the Court, the free exercise clause means that generally applicable, facially neutral laws do not receive strict scrutiny. *See Smith*, 494 U.S. 872 (and cases cited therein). But, according to Congress's efforts to enforce that provision, RFRA now requires strict scrutiny for such

claims. Far from enforcing the Bill of Rights in this instance, Congress simply has tried to change its meaning. The Court has never endorsed such an interpretation of section five. It should not do so now.

B. RFRA Does Not Remedy Prior Free Exercise Violations.

Nor can Respondent tenably argue that RFRA remedies *prior* free exercise violations. The only "evil" Congress attempted to "root out" is the Court's free exercise decisions that did not invoke strict scrutiny, and the only "remedy" RFRA provides is Congress's own interpretation of the free exercise clause. No precedent supports this exercise of section five power.

In each of the cases upholding Congress's exercise of this authority, the legislature identified a specific area of State legislation that undermined the goals of the Fourteenth Amendment and sought to eradicate these specific types of state law practices. But in none of these cases did Congress simply prescribe a standard of review for courts to use in assessing all future individual claims that the government had violated a Bill of Rights' guarantee. In this respect, RFRA differs from every section five case before it. It is purely definitional in nature, and simply reweighs the constitutional interests in cases involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. §2000bb-2(4). To the States' knowledge, in fact, Congress has never before globally changed the Court's interpretation of a Bill of Rights' provision by redefining, for all future cases involving that right, the relationship between the individual right asserted and the countervailing power of government.

Even aside from RFRA's failure to root out a specific state practice, the statute contains another constitutional flaw. It does not even pretend to exercise the kind of congressional power that section five contemplates. Notwithstanding the act's "findings," RFRA contains no indicia that Congress employed its "specially informed legislative competence" from which the Court might discern the "predicate" for Congress's "judgment" in this area. *Morgan*, 384 U.S. at 656. For example, there is no finding that the country is having problems with neutral state laws impinging on the religious freedom of citizens, and no suggestion that Know-Nothing legislation lies on the horizon. Nor does the specific fact pattern at issue in *Smith* -- Native American use of peyote as a religious practice -- even begin to justify the far-reaching legislation that Congress passed. Consider the reaction if Congress in the 1960's had exercised its section five power in the same way that RFRA does. Instead of passing the Voting Rights Act of 1965, which targeted specific voting rights problems and specific voting rights practices, Congress would have passed a law that dictated the appropriate standard of review for all voting rights challenges -- for example, holding that they all receive strict scrutiny even if no intentional discrimination is shown. It is unfathomable that even *Morgan* would have permitted such a trespass on States' rights.

Ultimately the only "judgment" Congress exercised in passing RFRA was its disagreement with the free exercise decisions of the Court that failed to apply strict scrutiny. Such "findings," or more precisely the lack thereof, do not support legislation related to race and voting rights, let alone legislation having to do with religion. *Morgan*, 384 U.S. at 653. Deference thus is only appropriate in an area in which Congress is competent to act, which simply does not include the appropriate standard of review for assessing free exercise claims. Congress cannot justify RFRA on any remedial

theory of section five power because there is no known constitutional wrong that the statute attempts to fix and no recognized congressional competence that the statute attempts to exercise. It would be one thing if this expansion of federal power came on the heels of the States' failure to respect a constitutional guarantee, as arguably was the case with the Voting Rights Act. There, at least, it could be said that the States brought the loss of authority on themselves. But it is quite another thing when Congress acts simply because of disagreement over the Constitution's terms. That was never the purpose of section five.

III. A Contrary Ruling Would Threaten Vital Principles Of Federalism.

No doubt the Fourteenth Amendment took power from the States and gave it to the federal government. But in doing so it did not repeal the Tenth Amendment or the principles of federalism for which it stands. Even after passage of the Fourteenth Amendment, the Constitution remains "an instrument of limited and enumerated powers," *New York v. United States*, 505 U.S. 144, 156 (1992) (quotation omitted), and the federal government likewise remains one "of limited powers," *id.* at 155 (quotation omitted). Quite simply, "the 14th amendment does not override all principles of federalism," *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991), which still "secures to citizens the liberties that derive from the diffusion of sovereign power," *New York*, 505 U.S. at 181 (quotation omitted).

For these reasons, before adopting an interpretation of the Constitution that "radically change[s] the whole theory of the relations of the State and Federal governments to each other," the Court requires "language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 83 U.S. 36, 78 (1873). *See also Hurtado v.*

California, 110 U.S. 516, 534-35 (1884); Joseph Story, *Commentaries on the Constitution of the United States* 957 (5th ed. 1905) (observing that the Constitution "is founded on a wholesome and strenuous jealousy, which foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, so far as is practicable"). The Constitution simply does not require -- either clearly or subtly -- the "radical change" to State-Federal relations that RFRA advances.

A. The Act Dramatically Limits Sovereignty Over Some Of The States' Most Basic Police Powers.

RFRA hampers the States in the exercise of basic police powers -- most conspicuously the operation of State prisons. As *Bell v. Wolfish*, 441 U.S. 520 (1974) noted:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security ... *such considerations are peculiarly within the province and professional expertise of corrections officials.*

Id. at 547 (emphasis added) (citations omitted).

Just last Term, the Court reiterated the disruptive effect that strict scrutiny would have on prison operations:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict-scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

Lewis v. Casey, 518 U.S. ____, 116 S. Ct. 2174 (1996) (quotation omitted).

As illustrated by the Statement of *Amicus* Interest, it is difficult to overstate the impact that RFRA has had on the States' administration of their prisons. The number of cases, the difficulty of resolving RFRA claims and the drain on State resources caused by the Act all have significantly burdened the States in this area.

Nor is the damage to State sovereignty caused by RFRA limited to these police powers alone. It affects education, public safety and other local functions. And no doubt, over time, other core areas of State governance will be preempted by RFRA's boundless requirement that the "least restrictive means" be used whenever general laws confront individual claims of religious liberty. That is why nearly half the States have filed challenges to the constitutionality of RFRA or joined briefs calling for its invalidation.

B. If Upheld, This Theory Of Section Five Authority Would Transform The Federal Government From One Of Limited Powers To One Of Unlimited Powers.

Perhaps worse, this broad theory of section five power could irreversibly impact other areas of State governance. What ultimately makes RFRA a Rubicon-crossing law is the exceedingly broad interpretation of section five authority on which it rests. There is nothing the least bit enumerated or in any way limited about a power to "protect[ ] constitutional value[s]" whenever Congress sees fit. H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993). If Congress is right about this interpretation of section five authority, it is no exaggeration to conclude that the theory ultimately transforms the federal government from one of limited to one of unlimited powers.

Consider the broad powers available to Congress in "enforcing" the equal protection clause. Not only does this clause prevent States from using suspect classifications, but it also prohibits them from drawing irrational classifications. *See e.g.*, *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989). As to the latter requirement, a prophylactic authority to enforce this constitutional value has no stopping point. Virtually any federal law that itself is rational can fairly be said to curb the risk of irrational state lawmaking in the area. Or like RFRA itself, Congress could just pass a law requiring all state laws to be more rational, say, "substantially rational." Placing prophylactic rules on top of prophylactic rules would convert section five from an enforcement provision into a general police power. That simply was never intended. *Cf. United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1634 (1995)

(declining to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *New York v. United States*, 505 U.S. 144 (1992).

Nor is the prospect of extending RFRA's logic to due process guarantees any less threatening to the vitality of a dual system of government with "powers . . . reserved to the States." U.S. Const. am. X. Whether used to protect the pure procedural guarantees of the due process clause, the substantive incorporation of selected guarantees contained in the Bill of Rights, or the other substantive guarantees of the clause, the theory eviscerates the principle that the States enjoy plenary police powers subject to the limited, specifically enumerated powers of Congress.

It takes little vision to anticipate how authority to protect procedural due process values could be transformed into an horizonless grant of legislative authority. Every law can be characterized in one way or another as involving "life, liberty, or property." That leaves the federal government a short step away from legislating a more appropriate "process" for State governments to follow before impacting these all-encompassing interests. *Civil Rights Cases*, 109 U.S. 3, 13 (1883) ("It is absurd to affirm that, because the rights of life, liberty and property, (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case.").

Similar threats flow from application of this theory to incorporated rights and other substantive due process guarantees. If RFRA is good law, what would prevent

Congress from passing legislation regulating all encounters between state law enforcement and the citizenry in the name of protecting Fourth and Fifth Amendment values? What would prevent property rights advocates from expanding this Court's "regulatory takings" case law, *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), in the name of protecting the values of the Takings Clause? What would prevent federal legislation nationalizing a system of punishments in the name of protecting Eighth Amendment values? And what would prevent the federalization of education, marriage and family laws in the name of protecting privacy and other substantive due process guarantees?

The RFRA theory, in short, raises many questions. And the answers to all of them render implausible the reconciliation of this broad theory of section five power with a system in which the national government has just limited powers. Indeed, under this theory, it is not clear why the Court's landmark federalism decisions in *Lopez v. United States*, *Seminole Tribe v. Florida*, and *New York v. United States*, are not a prophylactic step away from irrelevance. The sole limitation on the national government would be the decision not to exercise its power. Only a most feeble version of federalism would depend on congressional self restraint for its existence.

In the end, because all legislation in one way or another addresses the zero-sum conflict between the security interests of the collective citizenry and the liberty interests of the individual, there is almost nothing Congress could not do under this version of section five power. Quite simply, Congress's authority under the provision does not extend this far. The court of appeals' contrary ruling should be reversed.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request the Court to reverse the decision of the court of appeals and declare RFRA unconstitutional as applied to the States.

Respectfully submitted,

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Date: November 29, 1996

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 95-2074

IN THE

Supreme Court Of The United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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January 10, 1997

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

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QUESTION PRESENTED

Whether the pre-*Employment Division v. Smith* (*Smith*) free exercise decisions of this Court correctly used the compelling interest test to more clearly reflect the historical origins and intent of the Free Exercise Clause, thus supporting the Religious Freedom Restoration Act's (RFRA's) constitutionality and a reconsideration of *Smith*, and answering the question of whether Congress exceeded its authority under Section 5 of the Fourteenth Amendment of the United States Constitution in the negative.

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BRIEF OF *AMICUS CURIAE*[1]

I. INTRODUCTORY STATEMENT

A key issue which the Petitioner has asked this Court to consider is whether the Religious Freedom Restoration Act (RFRA) provides religious people with more protection than the United States Constitution requires. In order to answer this question, the Court must reconsider its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in light of the history of the Free Exercise Clause and pre-*Smith* precedent.

The Rutherford Institute is a non-profit organization providing legal services in defense of civil and religious liberties. The Institute believes this issue is critical to the fundamental right of the free exercise of religion for all Americans. As *amicus curiae* in this matter, The Rutherford Institute thus urges the Court to take this opportunity to reject its holding in *Smith* that neutral laws of general applicability cannot offend the Free Exercise Clause. In doing so, the Court would restore the compelling interest test for deciding free exercise cases and uphold the constitutionality of the Religious Freedom Restoration Act (RFRA) on the basis of its proper enactment by Congress under Section 5 of the Fourteenth Amendment.

Justice Souter noted in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court's last free exercise decision, that the *Smith* test should be reexamined "in the next case that would turn on its application." 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment). Justice Souter entreated the Court to reexamine *Smith* because the decision was "decidedly untypical" of the Court's

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[1] Counsel of record for all parties have consented to the filing of this brief and, pursuant to Rule 37, letters of consent have been filed with the Clerk.

treatment of formally neutral, generally applicable laws in prior free exercise cases but did not overrule those cases. *Id.* The result was "a free-exercise jurisprudence in tension with itself." *Id.*

Since the *Smith* decision, legal scholars have made important inquiries into the roots of free exercise of religion in this country. Professor Michael W. McConnell's *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) is perhaps the most notable work. Such works were not available to the Court at the time it decided *Smith*,[2] and if they had been, the Court may have found the historical justification for its free exercise precedents persuasive and upheld the compelling state interest test. *See Lukumi*, 508 U.S. at 574-5 (Souter, J., concurring in part and concurring in the judgment). Although this brief will summarize analyses and the many complex arguments in favor of overturning *Smith* found in that scholarship on free exercise history, the Court is commended to the original works cited for the in depth arguments which cannot be recreated in the space permitted here. *Amicus curiae* encourages the Court to re-examine *Smith* now in light of this scholarship and overturn its holding.

The history and original intent of the Free Exercise Clause establish its purpose to protect religious individuals, including the use of exemptions. The compelling interest test analysis effectuates this purpose. This Court's pre-*Smith* opinions thus provide the correct standard for analyzing free exercise cases. As a result, RFRA does not attempt to give more religious protection than the Constitution already provides. Thus, the question of whether Congress exceeded its Section 5 power should be answered in the negative.

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[2] See Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 102 (1990).

II. RECONSIDERATION OF *SMITH* IS SQUARELY WITHIN THE SCOPE OF THIS CASE BECAUSE THE ISSUE OF *SMITH*'S CONTINUED VALIDITY IS ENCOMPASSED BY PETITIONER'S CERTIFIED QUESTION

The second Question Presented in Petitioner's Brief on the Merits calls for a reconsideration of *Smith*:

> 2. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

Brief of Petitioner's, page i.

An essential element of Petitioner's Question is thus, first, whether RFRA provides religious protection "more than the Constitution requires." If this Court's pre-*Smith* decisions provide the correct legal standard for free exercise cases, RFRA is simply a codification of that standard dictated by the Constitution. Only if *Smith* is the proper legal standard does RFRA codify an accommodation of religious practices *greater than* this Court has held the Constitution to require.

Smith did not overturn pre-*Smith* precedents. *Lukumi*, 508 U.S. at 573-4 (Souter, J., concurring in part and concurring in the judgment). Instead, *Smith* re-characterized the holdings of those cases in an effort to harmonize them with its reasoning and rationalize its new standard. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1120-24 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 104-06 (1990). Since the *Smith* rule remains fundamentally at odds with those precedents, a genuine issue exists as to which constitutional rule courts should follow. *Lukumi*, 508 U.S. at 574

(Souter, J., concurring in part and concurring in the judgment). The Court must resolve this issue in order to answer Petitioner's second certified question.

There are other important reasons to reconsider *Smith*. First, the *Smith* rule was established without briefing and oral argument. *Id.* at 571-2. Rarely, if ever, has the Court decided an issue of such magnitude, not presented by the parties or the facts of the case, without notice and argument. *See generally* Laycock, 8 J.L. & Reg. 99. Second, and related to the first reason, *Smith* set forth a broader constitutional rule than was necessary to resolve the case. *Id.* at 572-3. Indeed, Justice O'Connor reached the same result as the majority by applying the existing free exercise precedents. *Id.* Finally, in the course of making its sweeping rule, *Smith* did not inquire into the roots of the free exercise of religion to interpret the original meaning of the Free Exercise Clause. *Id.* at 574-6. Before *Smith*, little information existed on the history of the Free Exercise Clause in either earlier Supreme Court opinions or in scholarly articles. Legal scholarship developed after *Smith* confirms that the pre-*Smith* compelling interest test is consistent with the original understanding that free exercise of religion was to be protected from the burdensome effects of neutral laws of general applicability. That scholarship, some of which is summarized below, must be considered now if *Smith*'s vitality as precedent is to be secure enough to justify considering rejection of RFRA.

In short, the Court must not only reconsider *Smith* as a necessary step to determining RFRA's constitutionality, but also to ensure that free exercise jurisprudence is not left in an unsettled and, to a broad spectrum of society, unsettling condition.

III. THE USE OF THE COMPELLING INTEREST TEST FOR DECIDING FREE EXERCISE CLAUSE CLAIMS, AS CODIFIED BY RFRA, IS CONSISTENT WITH THE HISTORICAL UNDERSTANDING OF THE FREE EXERCISE OF RELIGION

The Court must examine the historical roots of the free exercise of religion in this country in order to understand the original meaning of the Free Exercise Clause. In Religion Clause adjudication, no less than any other area of law, Justice Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and "*as illuminated by history*" is of particular relevance here. *Lynch v. Donnelly*, 465, U.S. 668, 678 (1984); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970). This historical inquiry shows that the long-standing method of exempting religious practices from generally applicable laws as an acceptable means of protecting religious beliefs is more consistent with the Framers' intent than a position of facial neutrality.

Using this approach, after a religious person demonstrates that a law burdens the free exercise of his or her religious beliefs, the government must show that the law serves some compelling state interest and is the least restrictive means for achieving that goal. If the state cannot meet its burden, courts must grant a religious exemption. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403 (1963). This exemption view of the Free Exercise Clause thus protects against unintended burdens on the free exercise of religion unless the state can demonstrate compelling need.

Ultimately, the issue of the nature and role of religion reduces to a question of perspective.[3] The compelling interest

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[3] From the perspective of the State, allowing exemptions is a slippery slope which would result in anarchy. From the religious believer's perspective such fears are baseless because in reality there are few proper

test forces a court to look at the case from both perspectives. First, the court must consider the religious adherent's perspective, and then it must analyze the case from the State's perspective.

Smith, however, advances a competing view. The individual religious adherent's perspective and concerns are irrelevant. According to *Smith*, the Constitution does not require exemptions for generally applicable laws. The protection provided by the Free Exercise Clause, then, is only against blatant attacks on specific religious practices. McConnell, 103 Harv. L. Rev. at 1418. Using this approach, the court asks the question from the State's perspective, is this law specifically directed at religious practices? If not, no protection through exemptions is merited.

Professor McConnell argues that the appropriate analysis of the Free Exercise Clause involves the perspective of both the state and the religious believer. Using this analysis requires the court to study the impact of the law in question on the religious petitioner, often a minority, even if the law makes no obvious reference to religion or has no religious dimension to the state or majority. The pre-*Smith* exemptions view is consistent with this approach and the development of protection from the time of the colonies to the framing of the Free Exercise Clause.

The Framers of the Free Exercise Clause had a long and varied tradition of religious experimentation to draw on as a result of the diversity in the colonies' and newly independent states' approaches to the relationship between Church and State. Although most of the colonies had established religions, the trend toward religious pluralism as an emerging

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laws which would conceivably conflict with the free exercise of religion. The religious perspective supports its position by claiming that proper laws would not conflict and conduct which was disruptive of the peace should be punished.

policy was tangibly rewarded. In those colonies without an established religion, most notably Pennsylvania, religious pluralism flourished and was rewarded with the highest levels of immigration. *Id.* at 1430. The experience of governments which supported a particular religion, on the other hand, show that religious diversity was not a virtue and persecution of religious minorities occurred. In fact, the term "free exercise" was first used in an American legal document when Lord Baltimore required the governor of Maryland to abstain from persecuting Christians in general and Roman Catholics in particular. W. Russell, *The Land of Sanctuary (dd ed. 1908)* at p. 130.

The trend towards greater protection of religion continued throughout other state legal documents. The Rhode Island Charter, for instance, used the term "liberty of conscience" to protect the free exercise of religion. The only restriction on this freedom was that it could not conflict with laws established to keep the peace. McConnell, 103 Harv. L. Rev. at 1426. Similar protection was later enacted in other colonies and were the most common expressions of the freedom in the constitutions of the newly formed states. The free exercise provisions expressly overrode any law contrary to religious exercise; and they limited the free exercise of religion only as necessary for the preservation of the peace as opposed to being subject to the entire body of the law. *Id.* at 1427. It is this tradition of tolerance within limits which is the precursor of the exemption view of the Free Exercise Clause.

The most direct influence on the development of religious tolerance in the constitutions of several of the newly formed states and the federal constitution was the effect of the writings of John Locke and their impact on Thomas Jefferson's Bill for Establishing Religious Freedom. *Id.* at 1430-31. Locke determined that religious intolerance was an indication of poor government and would result in civil disruption because religious diversity could not effectively be contained, and seeking to prevent it would only cause the disruption

which the government sought to avoid. If a free exercise conflict developed, however, Locke believed that the State's view was supreme and the individual could either comply with the law or disobey it according to the dictates of religion and accept the punishment of the State. *Id.* at 1433-34. Locke's view is consistent with the no-exemption policy of *Smith*. The development of religious freedom, however, did not stop with Locke.

Immediately after the American Revolution, the prevailing view was that State sponsorship of religion was inimical to the vitality of religion and would improperly subject it to State control. *Id.* at 1438-39. The role of the State under this view was that it should provide protection and non-interference with the practice of religion. In return, religious groups would inculcate their members with religious faith and, as a by-product, with virtue or public morality. This view prevailed over the old model under which the State supported religion to derive the benefit of public morality. *Id.* at 1441-43. In light of this new view, Locke's view of religious tolerance was deemed insufficiently protective of the free exercise of religion.

Additionally, the advent of judicial review and its protection of individual rights as a check on the power of the State led to further expansion of the doctrine of free exercise of religion. As a result of the constitutional grant of the responsibility to the courts to enforce the boundary between the power of the State and the rights of the individual, the court was empowered and obligated to determine what religious freedom requires and to protect it through the use of exemptions. *Id.* at 1445.

Thomas Jefferson's view of the role of religion, although similar to Locke's, represents an expansion of freedom of religion. Jefferson believed the role of the State was to act to prevent injury to others, or in other words, secure the peace. Toward this end, he believed that religious opinion or belief was not properly the subject of governmental action. This

belief extended to his rejection of State funded or sponsored religion. On the other hand, he believed that actions or conduct were the province of the State, and therefore, violations of the law should be prosecuted. *Id.* at 1451. Further expanding the view of religious free exercise, James Madison advocated a system in which the demands of religion would take precedence over the secular law in those matters concerning religion. *Id.* at 1453.

Most state constitutions comported with Madison's views on giving precedence to the individual's religious duties over the power of the State, and specifically included protection for the free exercise of religious beliefs. These free exercise provisions were stated affirmatively unlike the Jeffersonian view which, like that of Locke, merely tolerated religion. Professor McConnell relies on the religious freedom protections found in the various state constitutions as support for his interpretation of the federal constitution on the grounds that they are:

> the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term "free exercise of religion" meant what it had meant in their states. The wording of the state provisions thus casts light on the meaning of the first amendment.
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> *Id.* at 1456.

Although all of these provisions protected the free exercise of religion, there were differences in the scope of the protection. The more expansive statement applied to all actions with a religious motive, with the limitation of preserving the peace and safety of the remainder of the community. The other constitutions protected religious conduct only in the context of "worship." The term "worship" was used to limit the freedom to the rituals of religion. Professor McConnell concludes that the fact that the federal constitution used the

more expansive expression of the freedom was deliberate in light of the numerous examples of a narrower expression of the freedom. *Id.* at 1460. As a further indication of the direction of thought on the issue, he points out that subsequent state constitutions followed the more expansive definition. *Id.* at 1461.

Under these state constitutions, then, free exercise was generally limited only to prevent disturbances of the peace and safety of the remainder of the community. *Id.* at 1462. The presumption, therefore, was that the right of free exercise prevails in every instance except where the religious act violates a peace and safety regulation or when the religious act would trespass on the private rights of another. Thus, this approach valued freedom of religion and the perspective of the individual above a state's interest in areas not affecting the peace or public safety.

An examination of controversies prior to the passage of the United States' Free Exercise Clause supports the conclusion that the right of free exercise was intended to be an affirmative statement which permitted exemptions from generally applicable laws for religious acts, subject to the limitation that the religious acts not violate laws preserving peace, safety and the private rights of others. *Id.* at 1466. *But see*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). The issue of exemption arose only rarely in the largely homogeneous Protestant colonies. When it did arise, it usually involved oath requirements, military conscription or religious assessments. *Id.* Most often, an exception was created to the requirement to accommodate the religious conviction. *Id.* at 1467.

Another controversy supporting the exemption view arose because the federal Constitution did not contain general protections for religion. One argument stated that as the federal government is one of enumerated powers only, the absence of any power to create laws affecting religion provides

protection for religion. This argument was rejected by supporters of a free exercise amendment on the grounds that the many enumerated powers were more than sufficient to burden the exercise of religion.

The second argument asserted that the newly created system of checks and balances in conjunction with the existing religious pluralism would assure that no single group could gain sufficient power to enable it to oppress or frustrate the religious preferences of any other group. This argument was rejected on the grounds that, although it was adequate as far as it went, it did not provide sufficient protection against unwitting oppression of minority groups. The proponents of a free exercise amendment worried that minority groups with sufficient influence at the state level would not have equivalent influence at the national level and could be subjected to laws of general application which would tend to oppress religion. *Id.* at 1479-80. Therefore, the passage of the Free Exercise Clause itself lends further support to the idea that the Founders intended to provide exemptions as a means of protecting minority religions from laws of general application.

After debate, the final version of the amendment protected the free exercise of religion. Professor McConnell provides a detailed explanation of the development of the final version and possible reasons for differentiation in word choice. He concludes that the decision to use the word "religion" alone, instead of, or in conjunction with, the phrase "rights of conscience" was to provide a broad protection to organized religion. *Id.* at 1488-94.

The use of the word "religion" instead of "rights of conscience" is significant because it recognized that when religious convictions differed from the secular law, the individual was torn between two sovereigns, the State and God. This type of conflict was seen as materially different from a situation where an individual's moral judgment conflicted with a law. This was a difference in kind which was deemed worthy of special protection. Providing specific protection for relig-

ious differences was entirely consistent with the world view of the drafters. The Drafters believed that religious beliefs merited special protection, not because those beliefs were qualitatively superior to non-religious judgments, but because of the conflict between dual sovereigns, both of whom demanded obedience that was beyond the individual's control to harmonize. *Id.* at 1496-97.

It follows, then, that the *Sherbert* rule and its progeny allowing exemptions are more consistent with the understanding of the drafters of the First Amendment. *See Lukumi*, 508 U.S. 574-6 (Souter, J., concurring in part and concurring in the judgment). The history and original intent of the Free Exercise Clause support protection of religious individuals through providing exemptions, not merely prohibiting anti-religious discrimination. *Id.* at 1512. The compelling interest test is tailored to protect individual rights and to allow for exemptions when government has not used the least restrictive means in achieving its interest. The history and practice of allowing exemptions, the intent of the Founders, the state constitutions and the pre-Free Exercise Clause controversies all support the practice of allowing exemptions from generally applicable laws. *Id.* at 1511. RFRA's use of the compelling interest test, therefore, merely encapsulates the purpose of the Free Exercise Clause and does not add to the Constitution. As such, the question of whether Congress exceeded its Section 5 power should be answered in the negative.

IV. THE PRE-*SMITH* DECISIONS OF THIS COURT IN FREE EXERCISE CASES EMBODY THE HISTORICAL UNDERSTANDING THAT RELIGIOUS PRACTICES ARE PROTECTED FROM THE BURDENSOME EFFECTS OF NEUTRAL LAWS OF GENERAL APPLICABILITY

Prior to *Smith*, the Court's decisions in free exercise cases consistently embodied the concept that the Free Exercise Clause required not only formal neutrality, which would

prohibit only those laws whose object is to discriminate against religion, but also substantive neutrality, which would additionally require exempting religious practices from formally neutral laws. *Lukumi*, 508 U.S. at 562-6 (Souter, J., concurring in part and concurring in the judgment). The articulated rule applied in each of those cases was that a compelling government interest must be demonstrated to justify any substantial burden placed by the government on religious practice. There is no doubt that the Court applied heightened scrutiny in those cases. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Bob Jones University v. United States* 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Yoder v. Wisconsin*, 406 U.S. 205, 215-29 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940). *See also Lukumi*, 508 U.S. at 565-6 (Souter, J., concurring in part and concurring in the judgment).

In none of those cases did the Court inquire into the original meaning of the Free Exercise Clause in developing and applying the compelling interest test (nor did it in *Smith*), *Lukumi*, 508 U.S. at 574-5 (Souter, J., concurring in part and concurring in the judgment). Yet, that test emerged from the Court's natural reading of the Free Exercise Clause as a restriction on government's power to burden religious practices, whether by a law's object or by its unintended effect.

Such a reading is consistent with the Court's treatment of other First Amendment rights, frequently affording them exceptions from neutral, generally applicable laws. Laycock, 8 J.L. & Relig. at 103-04 (citing *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 445 (1958)(political parties and move-

ments exempted from facially neutral disclosure laws); *Hustler v. Falwell*, 458 U.S. 46 (1988)(creating special defenses for media against facially neutral tort law).

It is apparent from a review of Section III above that the historical origins of the Free Exercise Clause provide considerable support for the compelling interest test which the Court derived from a plain reading of the text. It certainly undermines the remark in *Smith* that the compelling interest test "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. Rather, it reveals how fully pre-*Smith* cases embodied the understanding of the Framers of the Free Exercise Clause, and how far *Smith*'s rule diverges from it.

Smith is inconsistent with free exercise precedent, which dates from *Sherbert*. Instead of adhering to this precedent, the Court relied primarily on cases which have been overruled or were minority positions. For instance, the Court relied on and quoted extensively from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), without mentioning that this case was essentially overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith*, 494 U.S. at 879. The Court also quoted from the three-justice plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), even though that opinion was not followed by five other Justices in separate opinions. *Smith*, 494 U.S. at 883. *Bowen* was later expressly rejected in *Hobbie*, 480 U.S. 141 (1987). The Court also cited an older case, *Reynolds v. United States*, 98 U.S. 145 (1879), which upheld a law prohibiting polygamy, practiced then by Mormons, but did so on the reasoning that the Free Exercise Clause protects only beliefs, not conduct. *Id.* at 166-67. But the Court later retreated from that position in *Cantwell*, 310 U.S. at 303-04. Even so, the Court has read *Reynolds*'s elaboration of the evils of polygamy as standing for the compelling interest test. *See, e.g., Sherbert*, 374 U.S. at 403.

In sum, these cases and their subsequent treatment by the Court validate the Court's continued endorsement of the compelling interest test, rather than support *Smith*'s rejection of it.

Lukumi, 508 U.S. at 569-70 (Souter, J., concurring in part and concurring in the judgment).

Smith's treatment of *Cantwell* and *Yoder*, two cases which unquestionably required exemption of religious practices from neutral laws of general applicability, is also problematic. Rather than apply those cases as pure free exercise precedents, *Smith* instead re-characterizes them as "hybrids," involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881-82. This hybrid distinction, however, is not supported by the text, nor the history of the Free Exercise Clause. Even so, religious freedom was the fundamental issue in both cases, as each was explicit in stating. *Cantwell*, 310 U.S. at 303-07; *Yoder*, 406 U.S. at 201. *Smith*'s attempt, then, at distinguishing *Cantwell* and *Yoder* as "hybrid" cases has instead shown them to be sound free exercise precedent.

Finally, *Smith* tries to reconcile its conclusion with the unemployment compensation cases involving free exercise. *Frazee*, 489 U.S. 829 (1989); *Hobbie*, 480 U.S. 136 (1987); *Thomas*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court noted that these were the only free exercise cases in which the compelling interest test had been used to invalidate a government action, and had only done so because they involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," *Smith*, 494 U.S. at 883-4, and as such "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

But as Professor McConnell has observed:

> Difficulty of administration can fairly constitute at least part of the government interest in enforcing the

> law without exceptions but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation - indeed to the full universe of claims governed by the due process requirement of "some kind of hearing."
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> McConnell, 57 U. Chi. L. Rev. at 1123.

Moreover, *Smith*'s distinction of these cases is one without a difference, because most free exercise cases "resemble the unemployment compensation cases in that they involve individualized governmental assessments of the claimant's circumstances." *Id.* (citing *United States v. Lee*, 455 U.S. 252 (1982); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) as examples of non-unemployment compensation cases that involved such individualized governmental assessments without the application of the compelling interest test).

Smith, therefore, is unconvincing in its effort to achieve its result without overturning any precedent, by relying on cases of dubious application (*Gobitis, Bowen* and *Reynolds*), and by distinguishing established free exercise precedent as either not primarily about free exercise (*Cantwell* and *Yoder*) or as *sui generis* (the unemployment compensation cases).

In fact, these free exercise cases all demonstrate that the compelling interest test was a natural outgrowth of the Court's plain reading of the Free Exercise Clause as requiring exemption from neutral, generally applicable laws - a reading which now acquires added texture from the recent legal scholarship on the historical context of the Free Exercise Clause.

CONCLUSION

The Court should uphold RFRA's constitutionality by reconsidering and rejecting its holding in *Smith* in light of post-*Smith* legal scholarship, which casts serious doubt on *Smith*'s consistency with the original understanding of the Free Exercise Clause and which substantiates the consistency of the compelling interest test with that same understanding.

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January 10, 1997

Supreme Court, U.S.
FILED
JAN 10 1993
OFFICE OF THE CLERK

(18)

No. 95-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF RESPONDENTS

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and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

This brief for the National Right to Work Legal Defense Foundation ("Foundation") is filed pursuant to Rule 37.3 with the written consent of all parties. The brief supports the position of the respondents.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

The Foundation has provided the attorneys and the funding for a long string of victories before this Court vindicating the statutory and constitutional rights of employees to be free from being forced to choose between their jobs and the compelled support of the political activities of labor unions. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

The Foundation not only helps employees to protect their political beliefs from infringement through compulsory unionism, it also assists employees whose religious beliefs are violated through compulsory unionism. *See, e.g., Wilson v.* NLRB, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 500 U.S. 1218 (1992); EEOC *v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990); *IAM v. Boeing*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced association with unions and their financial payments to those unions.

Amicus National Right to Work Legal Defense Foundation believes that the decision of the U.S. Court of Appeals for the Fifth Circuit was correct. However, *amicus* will not analyze this case on the basis used by the Court of Appeals or any of the parties. Instead, *amicus* argues that the Religious Freedom Restoration Act is constitutional because *Employment Division v. Smith*, 494 U.S. 872 (1990) was wrongly decided. If this Court revisits *Smith*, and reinstates the rule that existed before *West Virginia Board of Education v. Barnette*, 319 U.S. 624

(1943), the separation of powers arguments leveled by the Petitioner fail.[1]

SUMMARY OF THE ARGUMENT

The interests of the government in preserving the aesthetics of religion ("beautiful, stone church," Pet. brf. at 2) are pitted in this case against the substantive interests of church members in worshiping God. In Exodus, chapter 32, the Bible records the well-known story of God's people creating a golden calf to worship while Moses was on the mountain receiving the Ten Commandments. Upon Moses return, a serious discussion over the substantive aspects of worship ensued with the result that the golden calf was destroyed. Exodus 32:20. Had this occurred within the City of Boerne, Ordinance 91-05, proclaiming the City's cultural interest in preserving "architectural, archeological, cultural, social, economic, ethnic and political history" (Cert. Pet. App. 47a), might have transformed the golden calf into a permanent impediment to true worship.

In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 559 (1993), Justice Souter stated in his concurring opinion, "in a case presenting the issue [of the proper rule to apply in a Free Exercise claim], the Court should reexamine the rule *Smith* [*Employment Division v. Smith*, 494 U.S. 872 (1990)] declared."

This is that case. The rule presently applied to Free Exercise claims substitutes "neutrality" and "general applicability" for a critical weighing of the interests of the state against the impact upon individual worship. At present, the most mundane governmental interests, if neutral, can trump the most central rights of religious worship.

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[1] *Amicus* does not suggest that Petitioner's separation of powers argument should otherwise prevail or that *Smith* must be reversed for respondents to prevail.

The Court below based its decision (as it must) on the assumption that the *Smith* test controlled. This Court, however, can affirm on a different ground than that considered by the lower court. *Quackenbush v. Allstate Insurance*, ___ U.S. ___, 116 S. Ct. 1712, 1718 (1996). Although *amicus* realizes that in the "Questions Presented," Petitioner did not include whether the *Smith* rule should be revisited, it explicitly referred to the "criticism [of that rule] by members of this Court ... as well as others" (Cert. Pet., p. i) and raised whether Congress could impose "federal policy to accommodate religious exercise more than the Constitution requires." (*Id.*, p. ii) On that basis, *amicus* believes that what the "Constitution requires" is fairly embraced in the questions before this Court. *See, Lebron v. National R.R.Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 965-66 (1995).

This Court should reconsider and reverse *Smith* for three reasons. First, when a legal rule is in transition, this Court has acknowledged that it takes seriously the opinions of law professors and students. If this Court lends an ear to law students, how much more it should listen to Congress, a co-equal branch of government. Congress has spoken, and it believes *Smith* was wrongly decided.

Second, the *Smith* rule applies a completely different standard to the analysis of Free Exercise claims than is applied to any other First Amendment claim. This Court would not allow Congress to pass a law which said that religious claims are given separate and inferior treatment. Such a law would not even pass the *Smith* test. If the courts would not allow Congress to create such a rule, this Court should not permit such a situation to continue to exist in its own decisions.

Third, the *Smith* rule has no "roots." The compelling interest standard, on the other hand, can trace its roots back 200 years. The compelling interest standard has such deep "roots" because it more ably draws the line between government regulation and individual religious freedom. The compelling interest standard

examines the relative interests of the state and the believer and looks at the damage to religious freedom. It does not limit courts to a superficial examination of whether the state specifically targeted religion. It would not, for example, permit the government's interest in the aesthetic results of religion override the substance of religious worship.

If this Court reconsiders and reverses *Smith*, then Congress and the Court agree and the separation of powers issue evaporates.

ARGUMENT

THE *SMITH* RULE SHOULD BE ABANDONED IN FAVOR OF THE LONG-ESTABLISHED COMPELLING STATE INTEREST RULE.

I. Congressional Interpretation Of The First Amendment Is A Basis For Reconsidering *Smith*.

When this Court reversed the rule announced in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) ten years later in *Continental T.V. v. GTE Sylvania*, 433 U. S. 36 (1977), it prominently cited "the great weight of scholarly opinion [that] has been critical of the decision...." *Continental T.V.* 433 U.S. at 48-49. When reversing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and correcting years of vacillation on the appropriate standard, this Court in *Adarand Constructors v. Pena*, ___ U.S. ___, 115 S. Ct. 2097 (1995) said, "We also note that *Metro Broadcasting's* application of different standards of review to federal and state racial classifications has been consistently criticized by commentators." *Adarand*, 115 S. Ct. at 2115.

If the views of law professors and law students are relevant to whether a matter has been wrongly decided, how much more pertinent is the opinion of Congress, a co-equal branch of

government! As this Court recalled in *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980):

> [W]e are bound to approach our task [of passing on the Constitutionality of an act of Congress] with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. ...
>
> Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.

The Petitioner argues that congressional disagreement with the *Smith* rule demonstrates that Congress has overstepped its authority under section 5 of the fourteenth amendment. Leaving to the parties the argument on the question of the scope of congressional authority under section 5, congressional passage of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*) unambiguously shows that, at a minimum, a co-equal branch of the government believes that the majority of this Court was wrong in *Smith*. This alone should cause this Court to reconsider the *Smith* rule.

II. The Court Should Reconsider *Smith* Because The "Preferred" First Amendment Right To Freely Exercise Religious Beliefs Is Given "Second Class" Status.

In *Smith*, a bare majority of the Court decided that the universal test for evaluating First Amendment rights should no longer be applied to the First Amendment right of Free Exercise of religion. Instead of applying the compelling interest test which protects the First Amendment rights of speech, press, assembly and petition, *see, e.g., Wooley v. Maynard*, 430 U.S. 705, 716 (1977), the Court held any "neutral law of general applicability"

that violates an individual's religious beliefs is constitutional, *Smith*, 494 U.S. at 879, no matter how serious (or central) the infringement upon the individual's religious belief. *Id.* at 886-87.

All of the rights under the First Amendment are "preferred" and none are entitled to a higher place than the others. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *see, Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). As a practical matter, *Smith* set aside the First Amendment right of Free Exercise of religion and gave it "second class" status to the other First Amendment rights. As *Smith* acknowledged, there are only two situations in which the compelling interest standard is applied to Free Exercise claims: when the Free Exercise claim is teamed with other (apparently more worthy) First Amendment claims, *Smith*, 494 U.S. at 881, or when the object of the statute is to prohibit the exercise of religion. *Id.* at 878.

By applying the "neutral" and "generally applicable" test instead of the "compelling interest" test, *Smith* tore the Free Exercise clause from the pantheon of First Amendment rights and at best demoted it to the status of a "suspect classification" under the equal protection clause.[2]

This stark contrast between the way in which religion is treated and the way in which free speech is treated is shown by a comparison between the majority opinion in *Smith* and the decision of the Court in *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). In *Barnes*, the Court applied its longstanding First Amendment rule that freedom of expression can only be repressed based upon a "compelling interest." *Id.* at 567.

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[2] The argument of the majority in *Smith* that applying the compelling interest test to Free Exercise claims creates "a constitutional anomaly" - "a private right to ignore generally applicable laws" *(Id.* at 886) is completely unfounded. Every challenge to a statute based on Free Speech or Free Press claims asks that a governmental requirement not be applied to the challenger. Thus these claims also request "a private right to ignore generally applicable laws." *Id.*

In contrast, Justice Scalia, the author of the opinion in *Smith*, concurred in *Barnes* on the basis that the Indiana statute at issue was a "a general law regulating conduct and not specifically directed at expression, [therefore] it is not subject to First-Amendment scrutiny at all." *Barnes*, 501 U.S. at 572. This is precisely the test adopted by the Court in *Smith* to evaluate Free Exercise of religion claims, yet the rest of the Court in *Barnes* applied a much different test in this free speech case.

This demonstrates two things. First, the author of *Smith* believes that the test adopted in that case should be applied to other First Amendment freedoms. Thus, the application of the *Smith* test does not turn upon anything intrinsic to the Free Exercise clause. Second, it demonstrates that the rest of the Court does not believe that the *Smith* test should be applied to other First Amendment freedoms (or at least free speech).

If Congress voted to give religious objectors, among those who assert First Amendment claims, "second class" protection without articulating the reason for different treatment, this Court would declare that Congress violated the Equal Protection guarantees. *See, e.g., Romer v. Evans*, ___U.S.___, 116 S. Ct. 1620, 1628 (1996). In fact, if Congress passed a law that codified the *Smith* rule, such a law would violate the *Smith* requirement of "neutrality" and "general applicability." For this Court to continue in a fashion denied to the other branches of government by the Constitution is untenable.

III. The Compelling Interest Test Has "Roots," *Smith* Does Not.

Justice Frankfurter, in *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) admonished that:

> *[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves

> collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

In other words, if a rule collides with earlier, better developed doctrine, it has no "roots." *United States v. Dixon*, 509 U.S. 688, 704 (1993).

That is precisely the problem with *Smith*. As Justice Thomas noted in his dissent to the denial of *certiorari* in *Swanner v. Anchorage Equal Rights Commission*, ___U.S. ___, 115 S. Ct. 460, 460 n.1 (1994), *Smith* "supplanted the compelling interest test in Free Exercise Clause jurisprudence."

The supplanted compelling state interest test, which Justice Thomas called the "*Sherbert-Yoder*" test, had been around at least since the dates of those decisions. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

In truth, the compelling interest test has roots that extend back 200 years, not just 30 years. The Virginia Statute for Establishing Religious Freedom was adopted in 1786. LEO PFEFFER, CHURCH STATE AND FREEDOM 113 (1967). That statute provided that when it came to religious opinion, "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* at 114. Justice Rutledge, in his dissent in *Everson v. Board of Education*, 330 U.S. 1, 32 n.9 (1947) opined that the Virginia Statute was "[p]ossibly the first official declaration of the 'clear and present' danger doctrine."

The clear and present danger standard, or variations on it, was used by this Court in testing Free Exercise claims. In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Court evaluated Cantwell's religious proselytizing by saying "the petitioner's communication, considered in the light of the

constitutional guarantees, raised no such clear and present menace to public peace and order...." *Id.* at 311. [3]

Later, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court specifically rejected the lower "rational basis" standard for the evaluation of Free Exercise claims. Instead, it determined that freedom "of worship" is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639.[4]

Barnette is a particularly important case for it showcases *Smith's* historical problem. While the majority in *Barnette* adopted a standard that was at least the equivalent of the compelling interest test, the dissent of Justice Frankfurter argued for the *Smith* standard. Frankfurter wrote:

> If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it ... cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches

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[3] *Amicus* notes, however, that the Court earlier referred to "general and non-discriminatory legislation" to regulate street solicitation permits.

[4] Even earlier, in *Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925), the Court reviewed a statute which "[e]vidently was expected to have general application" requiring public school attendance for children between the ages of 8 and 16 years. Despite the general applicability of this statute, the statute was claimed to be unconstitutional because it interfered with the rights of parents to chose a Roman Catholic education for their children. *Id* at 532. Despite the general applicability of this statute, the Court struck down this violation of religious "liberty" on the basis that the legislation failed to have a reasonable relationship to a legitimate state purpose. *Id.* at 534-35. Failing to find even a reasonable basis for this generally applicable legislation, the Court was not called upon to test it against the higher compelling interest test.

> conscientious scruples or religious beliefs of an individual or a group.

Barnette, 319 U.S. at 651.[5]

Justice Frankfurter was right that the West Virginia pledge requirement was a generally applicable and neutral requirement. What is more, the Board in *Barnette* had even highlighted its intent to create a neutral, generally applicable rule in the introduction to the rule itself. *Id.* at 626, n.2. ("conscientious scruples have not in course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs.")

Thus, as early as 1943 the *Smith* test had been specifically rejected by the majority of the Court.

The "clear and present danger," "grave and immediate danger" test was simply a more colorful way of stating the *Sherbert-Yoder* "compelling interest" test. *Sherbert* cited *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) as its source for the compelling state interest test. *Sherbert*, 374 U.S. at 403. *Button* had cited *Cantwell* (among others) in its overview of the cases which set the constitutional parameters by which the issues in that case were to be judged. *Button*, 371 U.S. at 433. *Cantwell*, as shown above, recited the "clear and present danger" standard. 310 U.S. at 311. Thus, a 200 year-old line of precedent can be

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[5] In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court also specifically rejected the "generally applicable" test. In that case, the City of Jeanette had a forty-year-old ordinance requiring door to door salesmen to purchase a license to sell their wares. The Court held that this generally applicable, nondiscriminatory ordinance was unconstitutional when applied to those "selling" religious tracts as part of their practice of religion. "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. ... [E]quality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Id.* at 115.

drawn dating from the Virginia Statute for Establishing Religious Freedom in 1786 to *Yoder* in 1972.

Although this Court has not always clearly and uniformly applied the compelling interest test to Free Exercise claims, this was not so much because the Court was inartfully applying the "neutral" and "generally applicable" standard. Rather, the failure to clearly apply the compelling interest standard arose more from the distinctions based upon compulsion. If government compelled religiously proscribed behavior or punished religiously prescribed behavior through uniform and generally applicable laws, the compelling state interest standard applied. Consider what this Court wrote in *Bowen v. Roy*, 476 U.S. 693, 706 (1986):

> We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard.

When the City of Boerne denied the Archbishop the right to expand the St. Peter Church, it denied church members the right to worship together and therefore seriously interfered with their right of worship. This government interference with the fundamental right to meet together for religious services would historically have been tested by the compelling state interest standard.

It should be tested by that standard again.

A substantial motive behind the *Smith* rule appears to be the concern over the proliferation of religious beliefs. *Smith*, 494 U.S. at 888. ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.") Leaving to one side the fact that religious anarchy has not yet broken out despite the longstanding application of the "clear and present danger/ compelling interest" standard, the concern that accommodating religion might pinch is no excuse for drastically limiting that right. To the contrary, that is the very reason for the Free Exercise clause. Speaking of the religious right to refrain from pledging allegiance to the flag, Justice Jackson wrote:

> When they [religious beliefs] are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*

Barnette, 319 U.S. at 642 (emphasis added).

It is not too great a stretch to say that the "neutral" and "generally applicable" rule looks much like a test of the "delivery system" for governmental action. As an example, unless the government specifically targets religion, the courts close their eyes to the reason for the action and the impact of that action on the religious beliefs of citizens. Only when the "product" is "delivered" to believers alone, or not delivered to everyone, does the Court look further at what is going on. From time to time the press reports on a deranged shooter who randomly machine-guns all of the unlucky victims who cross his path. The shooting is neutral and generally applicable in that the shooter is not consciously targeting any specific type of victim. The harm inflicted, however, is extreme.

Instead of looking at the scope of victims covered, the government should return to looking at the extent of the harm caused by the government so that a lethal approach to the most sacred religious beliefs of its citizens can be avoided.

This Court's past practice permits overruling *Smith* and reinstating the historic compelling interest standard so that Free Exercise rights will once again stand equal to the other First Amendment rights. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court overruled its recent decision in *Grady v. Corbin*, 495 U.S. 508 (1990). In *Solorio v. United States*, 483 U.S. 435 (1987), the Court overruled the less than ten-year-old decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969). In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Court overruled the ten-year-old decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). In *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) the Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989): decisions that were less than five years old. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 695-701 (1978) partially overruled *Monroe v. Pape*, 365 U.S. 167 (1961). *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) overruled the three-year-old *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), to reaffirm "pre-*Kesler* precedent."

CONCLUSION

Smith should be revisited and overruled. The *Barnette-Sherbert-Yoder* compelling interest test should be reinstated as the standard by which Free Exercise claims are judged. This will, once more, allow the Court to consider the relative interests of the state and the believer.

Respectfully submitted,

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January 10, 1997

No. 95-2074

Supreme Court, U.S.
FILED
JAN 16 1997
CLERK

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS, *Petitioner*,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO
AND
UNITED STATES OF AMERICA, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") has represented the interests of the Orthodox Jewish community in the United States for more than thirty years. We have filed *amicus curiae* briefs in this Court in many of the leading cases involving the Religion

Clause of the First Amendment.[1] In this case we are filing this brief on behalf of various organizations that have advocated the interests of the Orthodox Jewish community over the years. They include:

(1) Agudath Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

(2) National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

(3) The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

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[1] *See, e.g., Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *TWA v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 505 U.S. 577 (1992); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Board of Education of the Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994).

(4) The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply involved in issues related to religious freedom.

(5) Torah Umesorah-National Society of Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

(6) The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

COLPA and several of the above organizations have also joined the *amicus curiae* brief of the Coalition for the Free Exercise of Religion. While we fully endorse the legal position stated in that brief, we are also filing separately to present the distinctive experiences that have affected Orthodox Jews in the United States and explain the singular importance to our community of a law such as the Religious Freedom Restoration Act.

ARGUMENT

I

THE RELIGIOUSLY OBSERVANT JEWISH COMMUNITY IN THE UNITED STATES NEEDS A BROAD DECLARATION OF PRINCIPLE PROTECTING RELIGIOUS FREEDOM TO ENABLE IT TO ENGAGE FULLY IN THE FREE EXERCISE OF RELIGION

We address first the practical impact of the Religious Freedom Restoration Act as attorneys who are regularly engaged in protecting the rights of a religious minority to observe the dictates of its faith. Orthodox Jews have unique religious observances affecting their dress (*e.g.*, the wearing of yarmulkes), their diet (*e.g.*, the obligation to eat only kosher food), and their work schedules (*e.g.*, the prohibition against work on Sabbaths and certain holidays). These observances are often impeded or even prohibited by neutral, generally applicable laws that have a disproportionate impact on members of the Orthodox Jewish community.

Prior to this Court's decision in *Employment Division, Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), the existence of the constitutional rule in *Sherbert v. Verner*, 374 U.S. 398 (1963), was an important tool in preventing arbitrary discrimination against Orthodox Jews who are employed by governmental agencies or otherwise affected by governmental action. Whenever a government agency refused to make a reasonable accommodation to the religious needs of an Orthodox Jewish employee, a volunteer attorney for the employee could, in negotiations with the government agency, invoke the rule of *Sherbert v. Verner*. Many accommodations were achieved on this basis through simple negotiation.

Once *Smith* was decided, this tool became unavailable. The governing rule — until the enactment of the Religious Freedom Restoration Act — was that no accommodation was required when a neutral, generally applicable rule impeded or prohibited the free exercise of religion. Enactment of the Religious Freedom Restoration Act has restored this negotiating tool, and has made government officials more amenable to the reasonable accommodation needed if a public school schedule, for example, conflicts with the observance of Yom Kippur or some other religious holiday.

When this Court observed in its *Smith* opinion that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation" (494 U.S. at 883), it was looking *only* to the reported decisions of this Court. In fact, the *Sherbert* test was useful in hundreds of situations that never resulted in litigation, much less in a case that came to this Court. It had very beneficent results in overcoming irrational and unjustified discrimination by government agencies against Sabbath observance or against wearing a yarmulke or following prescribed dietary laws.

For this reason, we view it as essential for the continued vigor of Orthodox Jewish observance to have a broad overriding principle of law — be it Constitutional or statutory on a federal level — that directs government officials to be mindful of the religious observances of those who are subject to governmental authority — whether as employees or in some other capacity. The *Smith* case has authoritatively declared that the First Amendment does not, of its own force, protect the religious observance of Orthodox Jews from neutral generally applicable laws that impede or prohibit religious observances, but the federal

statutory policy of the Religious Freedom Restoration Act provides the national moral imperative of religious tolerance.

II

THE FIRST AMENDMENT IMPLIEDLY GIVES CONGRESS PLENARY POWER TO PROTECT THE FREE EXERCISE OF RELIGION

We turn now to the constitutional basis for this declaration of national policy. We begin with the first sixteen words of the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The disjunctive "or" separates two types of laws that Congress is prohibited from enacting:

(1) a law "respecting an establishment of religion"

and

(2) a law "prohibiting the free exercise" of religion.

"Establishment of religion" is a subject prohibited to Congress regardless of which side the legislation takes. Consequently, any law "respecting" an establishment of religion is banned whether it encourages or discourages religion. The subject of "free exercise" is not similarly beyond the power of Congress. Only a law "*prohibiting* the free exercise" of religion is out-of-bounds. A law "protecting," "safeguarding," or "guaranteeing" the free exercise of religion is impliedly permitted.

If the Founding Fathers had intended to prohibit Congress from enacting any law relating to the free exercise of religion — whether such a law protected or prohibited religion — they would have chosen different language than now appears in the Religion Clause. The First Amendment could have read: "Congress shall make no law respecting an establishment of religion or the free exercise thereof." The word "prohibiting" that appears between the words "or" and "the" indicates that with regard to free exercise, only prohibition or restriction by law is constitutionally forbidden. Legislation that protects or defends free exercise of religion is constitutionally permissible.

It is a well-established principle of constitutional law that *every* word of the Constitution must be given "due force." The following observation made in *Holmes v. Jennison*, 14 Pet. (39 U.S.) 540, 570-71 (1840), was quoted in large part and reaffirmed in *Williams v. United States*, 289 U.S. 553, 572-73 (1933), and in *Wright v. United States*, 302 U.S. 583, 588 (1938):

> In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the

> instrument, therefore, can be rejected as superfluous or unmeaning. . . .

We contend that the First Amendment gives Congress plenary power to protect or secure the free exercise of religion, even while the Free Exercise Clause deprives it of power to "prohibit" or discourage religion. The Religious Freedom Restoration Act is, therefore, a permissible exercise of Congressional power because it secures rather than prohibits the free exercise of religion.

We recognize that this interpretation of the Free Exercise Clause — *i.e.*, as not merely denying Congress authority to enact legislation impeding religion but also authorizing governmental regulation to protect religion — is novel and is not supported by any judicial precedent. It is, nonetheless, supported by the language of the First Amendment and by the policies that the Free Exercise Clause was designed to implement.

It is also comparable to other constitutional authority that this Court inferred from a similar negative command in the Constitution. Article I, Section 9 declares that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended . . . ." The Constitution does not explicitly give Congress authority to legislate rules or standards governing the writ of habeas corpus. Nonetheless, in *Prigg v. Pennsylvania*, 16 Pet. (41 U.S.) 539, 619 (1842), Justice Story observed that although no express power to legislate regarding the Great Writ is enumerated in the Constitution, the authority to enact such legislation is "deemed by necessary implication within the scope of the legislative power of Congress." The same is true of the power of Congress to legislate to protect the free exercise of religion.

It may be argued that the Religion Clause's ban against Congress' making any law "prohibiting the free exercise" of religion is designed to invalidate a law that is otherwise within Congress' enumerated powers if it has the effect of prohibiting free exercise. Such a reading is not, however, consistent with the choice of words made by the Founding Fathers. The First Amendment does not say "No law prohibiting the free exercise of religion shall be passed" — the format chosen for prohibiting bills of attainder or ex post facto laws. Instead, the Constitution utilizes the active voice — "Congress shall make no law . . . ." That language appears implicitly to authorize the "making" of a law other than the type that the Religion Clause bars.

To be sure, the same rationale would authorize Congress to enact legislation to protect the other freedoms secured against "abridgement" in the First Amendment — *i.e.*, "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Just as Congress is authorized to enact a law that protects, rather than "prohibits," the free exercise of religion, it would be empowered to enact a law that secures, rather than "abridges," freedom of speech or of the press. In each case, of course, Congress' power extends only to state action, which is the conduct defined by the Constitution, and not to the acts of private parties. And in each case, Congress may legislate to safeguard the liberty defined in the First Amendment while it is prohibited from legislating to prohibit or abridge that right.

III

LEGISLATION PROTECTING THE FREE EXERCISE OF RELIGION WAS CONTEMPLATED AND APPROVED BY THIS COURT IN ITS *SMITH* DECISION

When Congress enacted the Religious Freedom Restoration Act in 1993, it was doing precisely what this Court invited in its decision in *Employment Division, Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). The district court in this case wholly misunderstood the meaning and significance of this Court's opinion in *Smith* when it said that the Congressional legislation was impermissible because it was "unconstitutionally changing the burden of proof" established under *Smith*. 877 F. Supp. at 358. In fact, Congress was assuming the obligation that this Court said in *Smith* was the duty of the legislature.

The Court's opinion in *Smith* concluded with a paragraph that contributed significantly to the result the Court reached. The Court observed that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. On this account, said the Court, accommodation to religious needs should be left "to the political process." *Id.* The Court recognized that the important values of the Free Exercise Clause enshrined in the Bill of Rights could be "protected against government interference" by "the political process." *Id.*

The Court surely did not mean that *only* state legislatures could protect those important national values. Expressing the majority's will, Congress directed that national policy should protect religious minorities, to the extent specified in the Religious Freedom Restoration Act,

against the effect of "generally applicable laws" that are neutrally applied. That expression of popular will is entitled to great respect. Rather than "overruling" this Court's decision in *Smith*, that resort to "the political process" *implements* this Court's decision.

What the district court and those who are challenging the constitutionality of the Religious Freedom Restoration Act fail to understand is that the Court did *not* say in *Smith* that religious exercise in the United States must forever be subordinated to any neutral, generally applicable law. The Court said only that the Constitution, as interpreted by the Judicial Branch of government, does not, in and of itself, protect religious minorities from the effect of generally applicable laws. But a legislature in a representative democracy may enact a law that protects the free exercise of religious minorities against the harmful effects of generally applicable laws. The *Smith* decision, we believe, invites and approves such legislation.

The critical lesson of *Smith* relates to the branch of government that effectuates the right of free exercise. *Smith* says that judges do not have the responsibility, under the First Amendment and its Free Exercise Clause, of devising religious exceptions to generally applicable laws. And the Court cites a long string of judicial decisions to demonstrate that, regardless of lip-service given to the implementation of the standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), the courts — and most notably this Court — has frequently failed to uphold the claims of religious minorities. The job, according to the *Smith* Court, is more appropriately the legislature's.

This Court's decisions construing Congress' power under Section 5 to enforce the commands of the Fourteenth Amendment support enactment of the Religious Freedom

Restoration Act. The court of appeals in this case (73 F.3d at 1357) was entirely correct in its analysis of *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Those decisions support the authority Congress exercised under Section 5 of the Fourteenth Amendment to pass the challenged law.

IV

LEGISLATION HAS ROUTINELY BEEN ENACTED TO PROTECT RELIGIOUS RIGHTS DENIED BY THE COURTS

We note, finally, that the Religious Freedom Restoration Act follows the path trod in other instances in which this Court denied a claim to rights under the Free Exercise Clause. Although the Court held in *Braunfeld v. Brown*, 366 U.S. 599 (1961), that Orthodox Jews had no constitutional right to keep their stores open on Sunday if they were closed on Saturday for religious reasons, various state legislatures did provide exemptions. 20 Mass. Gen. Laws Ann. ch. 136, § 6(8) (West 1996); N.D. Cent. Code § 12.1-30 (1995); S.C. Code Ann. § 53-1-160(F) Law (Co-op. 1995). Following this Court's rejection of the constitutional right to wear a yarmulke in the military (*Goldman v. Weinberger*, 475 U.S. 503 (1986)), Congress enacted a law requiring the armed services to permit "religious headgear" to be worn. 10 U.S.C. § 774. After *United States v. Lee*, 455 U.S. 252 (1982), Congress repealed the mandatory social security tax obligation as it applied to religious employers and employees who specified that their religious observance would be infringed by payment of such taxes. 26 U.S.C. § 3127. And the American Indian Religious Freedom Act Amendments, 42

U.S.C. § 1996a, were approved by Congress to protect the religious rights of American Indians to ingest peyote during religious ceremonies after this Court's *Smith* decision rejecting the constitutional right to do so.

The Religious Freedom Restoration Act follows the same beaten path. To be sure, it is more sweeping and general in its terms, but its effect is the same. It implements a legislative policy that fills a gap created by this Court's decision that religious observance is not protected by the Constitution itself. That is a permissible constitutional course, and it should be approved by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals sustaining the constitutionality of the Religious Freedom Restoration Act should be affirmed.

Respectfully submitted,

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January 1997

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FILED
JUN 10 1993
OFFICE OF THE CLERK

(20)

No. 95-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS
Petitioners

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent

and

UNITED STATES OF AMERICA,
Intervenor-Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, The Becket Fund respectfully submits this brief *amicus curiae* in support of Respondents.[1] The Becket Fund is a bipartisan and ecumenical

[1]All parties have consented to the filing of this brief. The Petitioner and Respondent Flores have previously filed a letter of consent with the Clerk. A letter of consent from the United States has been filed

(continued...)

public-interest law firm that protects the free expression of all religious traditions. We are, for example, currently representing Catholics, Protestants, Mormons, Jews, Muslims and Buddhists in a variety of cases.[1] Some involve the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, at issue here. Our brief addresses the issue of *stare decisis* in the context of the original understanding of Section 5 of the Fourteenth Amendment. In particular, we challenge the view of original understanding put forward by the Clarendon Foundation in its brief *amicus curiae* in support of Petitioner. Accordingly, we believe our brief will complement, and not duplicate, the briefs of the parties and thus assist the Court in resolving the case.

SUMMARY OF ARGUMENT

Petitioner's *amicus*, the Clarendon Foundation, urges this Court to overrule *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and thus invalidate RFRA, on the basis of Clarendon's proffered original understanding of Section 5 of the Fourteenth Amendment. This argument is flawed for two reasons. First, it fails to give sufficient weight to the principle of *stare decisis*. And second, it misreads the original understanding.

Although the Court and individual Justices have enunciated many different versions of *stare decisis*, three basic points emerge: (1) Respect for precedent is, at a minimum, "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). (2)

---

[1](...continued)
simultaneously with this brief.

Any "detours from the straight path of *stare decisis* . . . have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). And (3) "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991).

Katzenbach and its progeny, and the construction of Section 5 they embody, present just such a rule of law on which both legislatures and citizenry have relied. Overruling it now in order to invalidate RFRA would uproot much legislation at great social cost. Accordingly, the principle of *stare decisis* requires that such a drastic step be taken only for a demonstrably grave reason.

The only reason proffered by the Clarendon Brief, a mistaken version of the history of Section 5, is inadequate. The Clarendon argument focuses principally on two pieces of history: the Bingham draft of the Fourteenth Amendment, which was not passed in its original form, and the debates over the Civil Rights Act of 1871, especially § 2, now codified principally at 42 U.S.C. § 1985(3) (1994). Neither proves Clarendon's point.

The Bingham draft provided that

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of

> citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

Contrary to Clarendon's claim, the Bingham draft, while criticized, was never flatly rejected or even tabled. It was instead postponed. Cong. Globe 39th Cong., 1st Sess. 1095 (1866). Moreover, the opposition to the Bingham draft was more complex than Clarendon realizes. Some opponents criticized it for doing too much--giving Congress too much authority. Others criticized it for doing too little--relying exclusively on Congressional action. But neither side criticized it merely for authorizing prophylactic legislation such as RFRA to protect a right already contained in the Fourteenth Amendment.

Similarly, the debate over § 2 of the Civil Rights Act of 1871 makes clear that the original understanding of Section 5 permitted legislation that went beyond judicial enforcement of the Fourteenth Amendment. Indeed § 2 explicitly reached private conspiracies. And while § 2 has been upheld by this Court under the Thirteenth Amendment in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), it was originally debated under Section 5 of the Fourteenth Amendment. Whatever this may say about the constitutional competence of the drafters of § 2, it is compelling evidence that the original understanding of the Fourteenth Amendment was at least as broad (and probably broader) than that expressed in *Katzenbach*.

In short, the history of Section 5 demonstrates that the original understanding provides no basis for departing from *stare decisis*, overruling *Katzenbach* and its progeny, and invalidating RFRA.

Finally, and alternatively, should the Court disagree and invalidate RFRA, it should provide the district court on remand with guidance on the Free Exercise claim still pending before it. In particular, it should give that court guidance on the continuing validity of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), much as the separate opinions in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994), questioned the continuing validity of *Aguilar v. Felton*, 473 U.S. 402 (1985).

ARGUMENT

The Clarendon Foundation, writing in support of petitioner, has asked this Court to overrule *Katzenbach v. Morgan*, 384 U.S. 541 (1966), in whole or in part. Brief of Clarendon Foundation as *Amicus Curiae* in Support of Petitioner ("Clarendon Brief") at 5-21. This drastic step is required, it says, by an originalist reading of Section 5. With respect, we disagree. As demonstrated below, the original understanding of Section 5 was at least as broad as the construction this Court has placed on it. More to the point, it in no way required departing from the principle of *stare decisis*, reconsidering *Katzenbach*, and invalidating RFRA.

I. THE DOCTRINE OF *STARE DECISIS* COUNSELS GREAT CAUTION IN RECONSIDERING *KATZENBACH V. MORGAN*

This Court and its individual Justices have taken a variety of approaches to the principle of *stare decisis* in constitutional adjudication.[2] The present case does not require the Court to

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[2]Some Justices have held to a relatively weak rule of *stare decisis*. For example, Justice Scalia wrote in *South Carolina v. Gathers*, 490 U.S.

(continued...)

settle on any one of these versions. There is sufficient consensus on three basic points to resolve the issue at hand.

First, respect for precedent is, at a minimum, "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). It is, in Justice Harlan's words, the basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. State Marine Lines*, 398 U.S. 375, 403 (1970). It allows the citizenry to "have confidence that the rules on which they rely in ordering their affairs . . . are rules of law." *Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Thus, the principal of following the

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[2](...continued)
805, 825 (1989), that "[w]ith some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible," *stare decisis* has little place in constitutional decisions. Justice Douglas likewise believed that "[t]he place of *stare decisis* in constitutional law" was "tenuous," and stressed that "above all else . . . it is the Constitution which [a Justice swears] to support and defend, not the gloss which is his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

Other Justices have stated a more robust rule. Justice Stevens articulated a relatively strict standard in *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1 (1983); *see also Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). *See also* Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 284 (1990). Other Justices who have taken positions along this spectrum include Justice Goldberg, *Equal Justice 4* (1971); Justice (then-Solicitor General) Reed, *Stare Decisis and Constitutional Law*, 35 Pa. B.A.Q. 131 (1938), and Justice Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944).

rules of cases already decided "is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)). It protects "the settled practices and expectations of a democratic society." *Payne*, 501 U.S. at 835 (Scalia, J., concurring). *Stare decisis*, in short, requires that precedent normally be respected.

The second point follows from the first. "[A]ny detours from the straight path of *stare decisis* . . . have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). Thus, "even in constitutional cases, the doctrine carries such persuasive force that . . . departure from precedent [must] be supported by some 'special justification.'" *Payne*, 501 U.S. at 842 (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

Third, and finally,

> *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations.

Hilton, 502 U.S. at 202. *See also, Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme . .

. where reliance interests are involved").[3]

For the reasons set forth in Respondent Flores' brief, *Katzenbach* and its progeny, and the construction of Section 5 they embody, present just such a rule of law. Overruling this established law now in order to invalidate RFRA would uproot much legislation at great social cost. Accordingly, the principle of *stare decisis* requires that such a drastic step be taken only for a demonstrably grave reason. The only reason proffered by the Clarendon Brief is an idiosyncratic version of the legislative history of Section 5. As we demonstrate below, Clarendon's reading of history is insufficient to require this Court to depart

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[3] Thus, the Court has refused to overrule even palpably erroneous precedent that has become embedded in the law. In *Davis v. Department of Labor*, 317 U.S. 249 (1942), the Court limited, but did not overrule, *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). *Jensen* had held that the Constitution's grant of admiralty and maritime jurisdiction to federal courts prevented a state from requiring compensation of a longshoreman injured on the gangplank of a docked ship. *Davis* then upheld an award under Washington law to the widow of a worker who drowned in a navigable river. It did so by creating a "twilight zone," in which employees could recover under either federal or state law. 317 U.S. at 256.

Concurring in *Davis*, Justice Frankfurter thought that *Jensen* should be overruled, but declined to do so because:

> Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. Federal and State enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being.

317 U.S. at 259 (Frankfurter, J., concurring). *See also Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

from *stare decisis,* re-examine *Katzenbach*, and strike down RFRA.

II. THE ORIGINAL UNDERSTANDING OF SECTION 5 WAS AT LEAST AS BROAD AS *KATZENBACH'S*

The Clarendon Foundation argues that precedent should be abandoned in favor of what it claims was the original understanding of Section 5.

Its argument focuses principally on two pieces of history: the Bingham draft of the Fourteenth Amendment, which was not passed in its original form, and the debates over the Civil Rights Act of 1871, especially § 2, now codified principally at 42 U.S.C. § 1985(3) (1994). Neither proves Clarendon's point.

A. The Bingham Draft

The Bingham draft of the Fourteenth Amendment was solely a grant of power to Congress:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

Clarendon claims (1) that this draft was flatly rejected, (2) that it was rejected because it gave Congress too much power, and (3) that RFRA assumes the power denied to Congress when the draft was rejected. Each step in this argument has serious

problems. The last is the most problematic of all.

1. As an initial matter, it is not even clear that the Bingham draft was flatly rejected. It was sharply criticized, but not formally voted down. The Clarendon Brief states that "The House . . . voted 110 to 37 to table Bingham's proposal," Clarendon Br. at 8. But this is not so. The motion to table, which would have effectively killed the amendment, was *defeated* by a vote of 110 to 41. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). A motion to postpone, which kept the amendment alive, was then passed by 110-37. *Id.*[4]

2. There was indeed serious opposition to the Bingham draft. But the story line is not as simple as the Clarendon Brief's telling of it. The opposition to the Bingham draft came from multiple directions. Some said it did too much, others that it did too little. It was said to do too much because it lacked a state action requirement, and opponents feared that it would enable unlimited federal legislation. *See infra.* It did too little because its effect would have depended wholly on *Congressional* action, and when the southern states were readmitted, any implementing legislation would be vulnerable to repeal. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (Rep. Hotchkiss). Thus, immediately before the vote, Rep. Hotchkiss said that on the critical issue of insulation from

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[4] Debating this history in 1871, Rep. Farnsworth claimed that Republicans defeated the motion to table solely out of party loyalty. He thought that the motion to postpone was intended to have a similar effect. Cong. Globe, 42d Cong., 1st Sess. app. 115 (1871). But Bingham denied that, and argued that he subsequently proposed a *stronger* draft instead, which became the Fourteenth Amendment. *Id.* Suffice it to say that the Clarendon Brief exaggerates the fate of the Bingham draft, which was postponed and not tabled.

future political change, the draft was too weak: "I think the gentlemen from Ohio [MR. BINGHAM] is not sufficiently radical in his views upon this subject." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). Rep. Conkling responded that he would vote to postpone "for very different reasons from, if not entirely opposite to, those [Rep. Hotchkiss] has just given." *Id.* Ultimately Bingham himself concluded that it did too little. Because it did not expressly mention states, he feared that courts would follow the reasoning of *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), and construe the amendment not to limit state action at all. Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871).

In short, even if the Bingham amendment was postponed for lack of support, it is impossible to say with certainty *whose* lack of support caused its postponement. Criticism came from both directions--and, in the end, from Bingham himself.

3. But even assuming that the postponement of the Bingham amendment was a defeat, and even assuming that it was defeated solely for the reasons the Clarendon Brief suggests, that still would not justify Clarendon's conclusion that *Katzenbach* and RFRA improperly resurrect the Bingham draft. The critics cited by Clarendon did not argue that Congress should be deprived of *all* power to make prophylactic rules to protect life, liberty, or property. Rather, they argued that the Bingham draft went too far and conferred on Congress plenary power to legislate on all subjects. That, they feared, would have converted the United States from a government of limited and delegated powers to a government of general ones. Thus, Senator Stewart said that the only way to implement the Bingham draft:

> would be for Congress *to legislate fully upon all subjects* affecting life, liberty, and property, and in

> this way to secure uniformity and equal protection to all persons in the several States.

Id. at 1082 (quoted at Clarendon Br. 7) (emphasis added). And Rep. Hotchkiss argued that the amendment would "authorize Congress *to establish uniform laws* throughout the United States upon . . . the protection of life, liberty, and property." *Id.* at 1095 (quoted at Clarendon Br. 8).

RFRA does no such thing. It is not an example of unbridled federal legislation concerning things proper to the States. It is, instead, an example of the Congress legislating to protect a right this Court has held to be incorporated in the Fourteenth Amendment itself.

B. The Debate Over The Civil Rights Act of 1871

The Clarendon Brief makes similar arguments based on the retrospective 1871 debate over what the Bingham draft had meant and how the Fourteenth Amendment ultimately differed from it. These arguments do not prove Clarendon's point, either.

1. The issue in the debate was whether Congress had power to enact § 2 of the Civil Rights Act of 1871 (now codified at 42 U.S.C. § 1985(3)). Rep. Garfield took the occasion to emphasize the importance of the Fourteenth Amendment's state action requirement:

> The [Fourteenth Amendment] exerts its force *directly upon the States*, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear *directly upon the citizens* . . . .

Cong. Globe, 42d Cong., 1st Sess. app. 151 (1871) (quoted in Clarendon Br. at 11) (emphasis added). That would have been too much. The possible scope of "life, liberty and property" is vast, and opponents feared that a power to regulate individuals for the protection of life, liberty, and property would be a general legislative power. Thus, he continued:

> [The Bingham draft] contained a clear grant of *power to Congress to legislate directly* for the protection of life, liberty, and property within the States. . . . [It] gave Congress *plenary power to cover the whole subject* with its jurisdiction . . . to the exclusion of the State authorities.

Id. (quoted in Clarendon Br. at 11) (emphasis added). By contrast, "The [Fourteenth Amendment] *limited but did not oust* the jurisdiction of the State over these subjects." *Id.* (quoted in Clarendon Br. at 11) (emphasis added).

But, once again, RFRA does exactly what Garfield said the Fourteenth Amendment authorized, and it does *not* do what Clarendon's favorite critics feared the Bingham draft would have done. RFRA "limit[s] but [does] not oust the jurisdiction of the State." Consistently with RFRA, states can pursue any policy and regulate in any field, subject only to the limit that substantial burdens on religious practice must be justified. RFRA enforces "restrictions and limitations upon [State] power." But it does *not* enact "uniform laws" in the states; it does *not* "legislate fully upon all subjects;" it does *not* "bear directly upon the citizens." Rather, it "exerts its force directly upon the states" by limiting state law.

2. The Clarendon Brief is as instructive for what it does *not* say about the 1871 debates as for what it does say. While relying heavily on the debates over the Civil Rights Act that

year, it nevertheless does not reveal the outcome of those debates. The omission is telling, for the outcome ultimately refutes Clarendon's position. That outcome was a statute--passed with the support of the critics Clarendon quotes--that itself reached even private conspiracies. We do not suggest that Section 5 should be interpreted to authorize legislation reaching purely private conduct. We merely point out that the original understanding of Section 5 was considerably more exuberant than Clarendon thinks.

The speeches quoted by Clarendon were directed at a bill, introduced by Rep. Shellabarger, that could be interpreted to apply to almost any crime or tort committed by two or more people.[5] Rep. Farnsworth argued that because the mere requirement of two or more persons had no constitutional significance, the proposal really assumed the power to enact

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[5] The Bill provided:

> That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof, shall be liable to a penalty of not exceeding $10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court.

Cong. Globe, 42d Cong., 1st Sess. app. 113 (1871).

general federal criminal law in the States. Cong. Globe, 42d Cong., 1st Sess. app. 113 (1871). Rep. Willard agreed. He contended that the original bill "gave to the United States courts jurisdiction of every criminal offense that could be committed anywhere within the limits of the United States." *Id.* at 188.

Of course, those objections fit perfectly with similar objections raised to the earlier Bingham draft of the Amendment itself, and that is why Clarendon quotes them. Farnsworth and Garfield argued that the Bingham draft had been rejected solely because it would have conferred on Congress a general legislative power. They contended the Shellabarger bill should be rejected for much the same reason--it assumed such a power existed.

But those criticisms were not the end of the matter. On April 5, Shellabarger offered a new draft that responded to the objections. *Id.* at 477. The point of the revision was to exclude ordinary crimes and torts, to disclaim any general power of legislation, and to focus on particular crimes and torts that were closely connected to constitutional rights. The key insertion was to require that the conspiracy have "the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." The civil version of this language is now codified in 42 U.S.C. § 1985(3) (1994); the entire original provision is set out in *Kush v. Rutledge*, 460 U.S. 719, 727-29 (1983).

Significantly, the new language still did not confine the statute to any judicially enforceable meaning of the Fourteenth Amendment. The statute plainly applies to private conspiracies, although the Amendment on its face applies only to state action. True, the private conspiracies had to be specifically directed to the equal enjoyment of Fourteenth

Amendment rights. Ordinary crimes and torts, motivated by greed, malice, or random violence, were not included. And the general power to legislate was disclaimed, while a connection to the Fourteenth Amendment was emphasized. But the fact remains that the bill reached private conspiracies--and enjoyed the support of Farnsworth, Garfield, Willard, and the other moderate Republican critics. Cong. Globe, 42d Cong., 1st Sess. 522 (1871).

The Clarendon Brief quotes Farnsworth as follows: "If [the Fourteenth Amendment] requires 'enforcing' legislation, what kind does it require? Certainly not a law which goes *a long way* beyond the scope of the provision." *Id.* app. 117 (quoted in Clarendon Br. at 13) (emphasis added). The subsequent history of the bill shows that Farnsworth meant exactly what he said: enforcement legislation could, in his view, go "beyond the scope of the provision," but it could not go "a long way beyond." Congress could deal with private conspiracies even though the Amendment did not reach them, but any such legislation had to maintain a close nexus with the Amendment; it could not spread into a general power to legislate in the states. Whatever this may say about Farnsworth's grounding in constitutional theory,[6] it is compelling evidence that the original understanding of Section 5 was not what Clarendon thinks it was.

This legislative history is of course familiar to this Court. The Court reviewed it in *Griffin v. Breckenridge*, 403 U.S. 88, 99-102 (1971), and the unanimous Court read it exactly as we have read it:

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[6] This Court, of course, eventually upheld § 2 as applied to private conspiracies under the Thirteenth Amendment. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). The debates, however, took place in the context of Section 5 of the Fourteenth Amendment.

> The enormous sweep of the original language led to pressures for amendment, in the course of which the present civil remedy was added. The explanations of the added language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private conspiracies.
> . . .
>
> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

Id. at 100, 102.[7]

In short, the legislative history relied on by Clarendon supports our position, not theirs. It is consistent with long established precedent upholding prophylactic enforcement legislation that goes beyond judicial enforcement of the Fourteenth Amendment. Most importantly, and at a minimum, it shows that Petitioner and its *amicus* have fallen far short of showing that the original understanding requires a wholesale

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[7] This view of the legislative history is also summarized and reaffirmed in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-69 (1993), and unanimously in *Kush v. Rutledge*, 460 U.S. 719, 724-27 (1983). The Court in *Kush* notes that "the legislative history is discussed accurately and persuasively" in *McCord v. Bailey*, 636 F.2d 606, 615-17 (D.C. Cir. 1980), an opinion that reviews the legislative history in some detail and is fully consistent with *Griffin* and the view set out here. *Kush*, 460 U.S. at 707 n.10.

overruling of precedent.

III. IF THIS COURT DOES NOT UPHOLD RFRA IT SHOULD GIVE THE DISTRICT COURT, ON REMAND, GUIDANCE ON THE CONTINUING VIABILITY OF *EMPLOYMENT DIVISION V. SMITH*

In *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994), five Justices of this Court questioned the validity of *Aguilar v. Felton*, 473 U.S. 402 (1985). Justice O'Connor wrote that the Court should be "prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to . . . impartiality, not animosity, towards religion." 114 S. Ct. at 2498. Justice Kennedy agreed: "it may be necessary for us to reconsider [*Aguilar*] at a later date". *Id.* at 2505. *See also id.* at 2515 (Scalia, J., dissenting) (joined by Rehnquist, C.J., and Thomas, J.).

Just as *Felton* gave rise to *Kiryas Joel*, so too *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), gives rise to the present case.[8]

For the reasons set forth above, amicus believes that RFRA is constitutional under *Katzenbach* and its progeny, and the rule of law that these cases embody should not be disturbed. But should this Court disagree and depart from *stare decisis* to overrule *Katzenbach* and strike down RFRA, then this case would necessarily be remanded to the district court for a decision on the Free Exercise and property rights claims still

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[8] *Cf.* WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1. ("unnatural deeds do breed unnatural troubles").

pending there. In that eventuality, we respectfully urge this Court to apply to *Smith* the same standard of *stare decisis* it applies to *Katzenbach* and give the district court guidance on *Smith's* continuing validity in much the same manner as the *Kiryas Joel* Court commented on *Aguilar*.[9]

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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[9]It is not unheard of for a lower court to refuse to follow a precedent that has subsequently been undermined, and then to have its decision affirmed by this Court. The most recent example is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where this Court affirmed a decision by the United States Court of Appeals for the Third Circuit that had upheld restrictions on abortion that this Court had explicitly ruled unconstitutional in earlier cases. *Compare Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 449-51 and 439-442 (1983) (striking down, *inter alia*, statute requiring 24-hour waiting period for abortions and parental consent requirement for minor) *with Casey*, 947 F.2d 682, 706-707 and 707-709 (upholding, *inter alia*, 24-hour waiting period and parental consent requirement for minors).

Perhaps the most famous example is this Court's affirmance of the refusal of the District Court in *Barnette v. West Virginia State Board of Ed.*, 47 F. Supp. 251 (S.D.W.Va. 1942), *aff'd*, 319 U.S. 624 (1943), to follow *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), which had been handed down only two years earlier. In *Gobitis*, this Court had held that a school in Pennsylvania *could* force Jehovah's Witness children to salute the American flag, even though it violated their religious beliefs. Two years later, the District Court in *Barnette* refused to follow *Gobitis*. The District Court noted that two of the Justices from the *Gobitis* majority were no longer on the Court, and that in a decision subsequent to *Gobitis*, *Jones v. Opelika*, 316 U.S. 584, 598 (1942), the Court seemed reluctant to draw on *Gobitis*. See 47 F. Supp. at 253. This Court, of course, agreed with the District Court and affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 10 1993
CLERK

No. 95-2074

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

BRIEF FOR THE UNITED STATES CATHOLIC CONFERENCE, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE ORTHODOX CHURCH IN AMERICA, AND THE EVANGELICAL COVENANT CHURCH AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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39 pp

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act is a facially valid exercise of congressional power to enforce the Fourteenth Amendment.

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INTEREST OF THE AMICI CURIAE

These *amici curiae* represent diverse religious communities — Catholics, Lutherans, Orthodox Christians and Evangelical Christians — and agree that our Constitution provides affirmative protection for religious exercise, not merely protection from deliberate discrimination against religion. We believe therefore that this Court's contrary conclusion in *Employment Division* v. *Smith* was flawed, and we urge the Court to find the Religious Freedom Restoration Act (RFRA) constitutional. Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

The Constitution protects acts of religious exercise even when they contravene neutral laws of general applicability. The text, history, purpose, tradition, and precedent of free exercise protection in this country all lead to the conclusion that the Free Exercise Clause prohibits even generally applicable laws that impose a substantial burden on the exercise of religion. Because RFRA does no more than restate the import of the Free Exercise Clause, this Court should uphold the law.

ARGUMENT

This case presents a substantial question under Section Five of the Fourteenth Amendment only if the substantive requirements of the Religious Freedom Restoration Act extend significantly beyond those of the Free Exercise Clause itself. The purpose of this brief is to show that the Free Exercise Clause is not confined to laws that specifically target religious practice as such, but extends as well to neutral laws of general applicability that impose a substantial burden on the exercise of religion, contrary to this Court's recent ruling in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Any Justice who agrees with this interpretation of the Free Exercise Clause should vote to sustain the Act on that ground.

We will show that the great weight of the evidence — based on the text, history, purpose, tradition, and precedent of free exercise protection in this country — supports the broader interpretation adopted by Congress in RFRA rather than the narrower interpretation adopted for purposes of constitutional judicial review in *Smith*. But it is not necessary to go that far. In *Smith*, this Court was reviewing the act of a sovereign state, which is entitled to the presumption of constitutionality. If the two competing interpretations of the Free Exercise Clause were in

equipoise — each supported by substantial arguments based on text, history, purpose, tradition, and precedent — the principle of judicial restraint militated in favor of deferring to the legislature and upholding the state law in *Smith*. In this case, however, the Court is reviewing the facial constitutionality of RFRA; that Act of Congress is now entitled to the presumption of constitutionality. Under the same principles of judicial restraint that informed the *Smith* decision, the Court in this case must resolve any doubts in favor of the constitutionality of RFRA.

I. The Language Of The First Amendment Does Not Support The Contention That The Protections Of Free Exercise Are Confined To Discriminatory Laws

The Free Exercise Clause provides that "Congress shall make no law * * * prohibiting the free exercise [of religion]." Reading each of the key terms — "exercise," "free," and "prohibiting" — in accordance with 18th century (as well as current) meaning, the Clause is most naturally understood as protecting the exercise of religion from *all* forms of government hindrance or interference, rather than as protecting the exercise of religion from discriminatory acts only.[1]

"Exercise." Despite intimations in earlier opinions,[2] it is now generally accepted that the Free Exercise Clause, by its plain terms, extends to conduct as well as belief. "Exercise" means conduct — "the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877; see Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1755, reprinted 1979).[3] Any interpretation that fails

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[1] Much ink has been spilled on the definition of "religion," but that issue is not relevant to this case. The first word of the Amendment, "Congress," is also important, but after incorporation through the Fourteenth Amendment, we will assume that this word refers to all governmental actors.

[2] E.g., *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878).

[3] For a more detailed discussion of this point, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-1490 (1990).

to give protection to the "exercise" of religion is textually indefensible. Yet there is serious danger that, if RFRA is held unconstitutional, states will be able to evade the protections of the Free Exercise Clause by casting their prohibitions in neutral form.[4]

"*Free*." According to the leading dictionary of the day, the term "free" means "[u]ncompelled" or "unrestrained." *Id*. Thus, by the text of the Amendment, the exercise of religion must not be "compelled" or "restrained" by the force of government. There is no hint in any lexicographic source that "free" means "not singled out" or "treated unequally." It means not suffering from governmental compulsion or restraint.

"*Prohibiting*." The term "prohibit" is ambiguous in some contexts,[5] but it does not ordinarily connote discriminatory treatment. Dr. Johnson's dictionary offers the following definitions: "1. To forbid; to interdict by authority * * * 2. To debar; to hinder." *Id*. In conjunction with the term "free," it thus refers to any action of government that forbids or hinders the full and unrestrained practice of religion. RFRA uses the term "burden," which seems roughly synonymous with "hinder." There is no doubt that petitioner in this case is attempting to "prohibit" Archbishop Flores from taking actions he deems necessary and appropriate for the worship of God.

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[4] See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (to confine preemptive effect of federal statute to laws "specifically addressed to the airline industry" as opposed to "laws of general applicability" would "creat[e] an utterly irrational loophole"); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 & n.3 (1959).

[5] An example of an ambiguous context is *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), where the government's action hindered or prevented, but did not forbid or punish, religious conduct. For a more detailed discussion of the original meaning of the term "prohibiting," see McConnell, *Origins*, at 1486-1488.

In sum, the most natural reading of the Free Exercise Clause, as it would have been understood by the framers and ratifiers, is that it applies to any law that hinders, proscribes, or restrains religious conduct. See *Smith*, 494 U.S. at 893-894 (O'Connor, J., concurring). This is also its most natural meaning today. If a zoning ordinance restricted land use in a particular neighborhood to "residential uses," and a client asked her lawyer whether an ice cream shop would be "prohibited" there, the lawyer almost certainly would answer in the affirmative. It would not matter that the ordinance was not "specifically directed" (*Smith*, 494 U.S. at 878) at ice cream shops. Similarly, if there were a constitutional provision stating that "Congress shall make no law prohibiting the grazing of cattle on public land," this provision would compel the government to carve out an exception for cattle if Congress passed a law reserving the public land for recreational purposes. By the same token, if a dry county forbade the serving of alcoholic beverages, this would "prohibit the exercise of religion" as applied to a church that served communion wine, even if the law were "generally applicable" and not "specifically directed" at religion.

The alternative interpretation, adopted in *Smith*, appears to confuse the idea of a constitutionally protected *freedom* with the idea of protection against *nondiscrimination*. In the latter context, courts are concerned about whether government "singles out" a particular activity or class of persons, or acts with that forbidden purpose. In the context of freedoms, however, the Constitution protects certain spheres of human activity (property ownership, rights of contractual obligation, speech, and so forth), and the question is whether the government has interfered with that activity. Textually and structurally, the Free Exercise Clause, like the rest of the First Amendment, protects a freedom.[6] It focuses on the effect of the law — whether it hinders the exercise of religion — not on the form or purpose of the law.

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[6] Even in the context of expressive conduct — which, unlike religious exercise, is protected only incidentally — laws not specifically directed at the suppression of free expression are *not* thereby exempted from all scrutiny, but must satisfy intermediate scrutiny. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

We recognize that the Court in *Smith* concluded that the textual interpretation we are defending is not strictly "necessary" and that the nondiscrimination reading is "permissible." 494 U.S. at 878. But unless courts are free to choose among any possible meanings that are not *foreclosed* by the text, it would seem necessary to ask not only what meanings are "permissible," but which meaning is most probable. If, as we maintain, the most natural reading of the language of the Free Exercise Clause is that it protects against all laws hindering the exercise of religion, it would require powerful contrary evidence in the history of the framing or the subsequent interpretive tradition to reject the natural reading. As we will show in the next section, the weight of that evidence supports, rather than contradicts, the natural reading.

II. RFRA Is Consistent With The History And Early Interpretation Of Free Exercise

A. The Framers And Ratifiers Did Not Understand Free Exercise To Protect Only Against Laws Specifically Targeted At Religion

The scope of free exercise protection was not directly debated in the First Congress or the ratifying legislatures. Nevertheless, the language used in those deliberations reflects an expansive understanding of the free exercise guarantee, and suggests no limitation of the sort endorsed by *Smith*. Dissatisfied by the lack of a bill of rights in the original constitution, four of the states proposed an amendment stating that "all men have an equal, natural, and unalienable right to the free exercise of religion[,] according to the dictates of conscience."[7] This broad language suggests an intention to provide the highest degree of protection to this important right, and contains no hint that the protection does no more than prohibit discriminatory laws. Madison proposed a twofold protection: that "[t]he civil rights of none shall be abridged on account of religious belief or worship * * * nor shall the full

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[7] 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 334 (J. Elliot, 2d ed. 1896) (Rhode Island); 3 *id.* at 659 (Virginia); 4 *id.* at 244 (North Carolina). The New York proposal differed slightly in wording. 1 *id.* at 327.

and equal rights of conscience be in any manner, or on any pretext, infringed."[8] Since the first half of this proposal guarantees against laws specifically directed against religion (a nondiscrimination idea), the second half must have provided substantive protection to all exercises of the rights of conscience. This conclusion is bolstered by the express statement that these rights should not "be *in any manner* * * * infringed." This language is difficult to square with the idea that only one particular type of infringement — a discriminatory law — was intended to be covered.

Given the lack of directly pertinent legislative history, the most helpful sources are the various state constitutions and colonial charters that contained provisions protecting the free exercise of religion, and the general practice regarding conflicts between civil law and religious conscience.[9] There was little direct discussion or debate about whether the principle of free exercise of religion entails exemptions from civil law. This is hardly surprising. Most 18th Century Americans viewed the spheres of government and

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[8] 1 ANNALS OF CONGRESS 451 (J. Gales, ed. 1834) (June 8, 1789).

[9] Greater detail on the original understanding at the time of adoption of the Free Exercise Clause may be found in McConnell, *Origins*, at 1421-1513; Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. Rev. 591, 599-607 (1991); W. Cole Durham, Jr., *Religious Liberty and the Call of the Conscience*, 42 DePaul L. Rev. 71, 80-84 (1992); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371 (1996). Contrary views may be found in Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992); Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J. of Law, Ethics, and Public Policy 623 (1990); Gerard Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Michael J. Malbin, RELIGION AND POLITICS (1978).

religion as distinct, with little overlap or conflict. The vast majority were Protestant Christians whose religious practice did not conflict with civil law;[10] indeed, Protestant teaching emphasized that the obligation to obey the lawful commands of the sovereign was itself a religious duty. They bridled at suggestions that they were seeking the ability to commit criminal acts.[11] Moreover, the limited scope

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[10] Quakers, the religious sect whose practices were most likely to conflict with civil obligations, largely withdrew from politics in the 1770s and tended not to participate in the movement for greater free exercise protections. William G. McLoughlin, NEW ENGLAND DISSENT, 1630-1833, at 595 (1971). Their concerns, therefore, were not articulated.

[11] The issue of exemptions was most often raised, in exaggerated caricature, by *opponents* of broad religious liberty. For example, William Penn described one of the objections to liberty of conscience as follows: "at this Rate ye may pretend to Cut our Throats, and do all Manner of Savage Acts." William Penn, *The Great Case of Liberty of Conscience*, in 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 457 (London 1726, photo. reprint 1974). Penn's response was to deny that believers sought exemptions from any laws "that atend to Sober, Just, and Industrious Living." *Id.* On the other hand, Penn expressly denied that all enactments called "laws" automatically fell into this category. *Id.* at 458. For other examples, see McConnell, *Origins*, at 1448; Hamburger, *supra* note 9, at 942-945.

Hamburger observes that "dissenters who sought an expanded religious liberty disavowed a right of exemption from civil law" (*id.* at 942), but this overreads the evidence. Certainly, the advocates of expanded religious liberty disavowed any claim of exemption from *all* civil laws (the exaggerated claim made by their opponents), but as Hamburger's examples frequently show, they reserved the right to act according to conscience in the (presumably unusual) case of conflict. For example, see the 1791 sermon of House of Representatives chaplain William Linn ("[t]he members of the Church, indeed, are also members of civil society, and subject to all its laws, *so far as is consistent with a good*

of government — largely confined to peacekeeping and basic public infrastructure — made conflict with religion unusual. The issue of religious exemptions was, therefore, rarely raised explicitly in the debates of the day. This suggests that the modern dichotomy between "generally applicable" and "specifically directed" laws is anachronistic; that is not how our founders conceived of the issues.[12]

Nonetheless, the historical record, on balance, is most consistent with the broader interpretation of the free exercise principle. The advocates of religious freedom in early America — for the most part, intensely religious members of dissenting evangelical sects — were committed to a worldview in which duties to God were superior, in principle, to duties to worldly authorities. To be sure, they did not dwell on the conflict, which seemed to them remote and hypothetical; but their ultimate loyalty was to God over all. This general philosophy underlying the free exercise movement at the Founding was perhaps best articulated by Madison in his *Memorial and Remonstrance Against Religious Assessments*, 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt, ed. 1901) (reprinted in *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 28, app.

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conscience"). *Id.* at 945 n.113 (emphasis added) (internal quotation marks omitted).

[12] The more salient question, as seen at the time, was whether the protection of free exercise was confined to acts of "worship" or extended to other conduct compelled by religious conviction. See Jack Marietta, THE REFORMATION OF AMERICAN QUAKERISM, 1748-1783, at 226 (1984) (describing arguments by the Philadelphia Quaker society for exemptions from military conscription under the 1701 Charter of Privileges "liberty of conscience" provision); McConnell, *Origins*, at 1459-1461 (discussing differences between state constitutions on this issue). This remained a contested question at the time of adoption of the Fourteenth Amendment (see note 41, *infra*), but the distinction between acts of "worship" and other acts compelled or motivated by religion has not featured in constitutional doctrine in recent decades. Cf. *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981) (rejecting as untenable the distinction between "worship" and other speech).

at 63 (1947) (Rutledge, J., dissenting)). The duty to the Creator, Madison wrote, is "precedent both in order of time and degree of obligation, to the claims of Civil Society." *Id.*, ¶ 1.

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Id. Madison did not say that duties to the Creator are precedent only to laws specifically directed at religion, nor was the principle of religious freedom for which he strived limited to the prevention of deliberate acts of persecution or discrimination. Rather, the principle of free exercise was rooted in the precedence of conscience, which is the duty to God, over lesser obligations.

The purpose of the Religion Clauses was to enable citizens of many diverse creeds to live together in harmony, without violence to their consciences — even if it required the majority to make accommodations, where consistent with public peace and safety. As George Washington expressed the point in a letter to a group of Quakers:

> [I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[13]

This desire to "accommodate" faiths at odds with the majority is the most important distinguishing feature of American church-state "separation." By contrast to the anticlerical disestablishment proceeding at roughly the same time in France, religion in America

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[13] Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11 (E. Humphrey, ed. 1932).

was set apart because of its central importance to the lives of the people. Religion was not submerged in secular society, as in France, nor subordinated to majoritarian secular concerns. Instead, the First Amendment extended special and emphatic constitutional protection to the full and free exercise of religion, achieving the desire of Washington and Madison (along with many others) to ensure that "the laws may always be as extensively accommodated to [religious minorities], as a due regard for the protection and essential interests of the nation may justify and permit." RFRA stands as the modern expression of this commitment of our founding fathers.

Although conflicts between religious convictions and civil law rarely arose, the conflicts were typically resolved by granting exemptions to the religious objectors. The most common exemptions were from oath requirements, military conscription, and religious assessments.[14] The nearly universal practice of exempting Quakers and other religious pacifists from military service demonstrates that exemptions were a common and familiar response to conflicts between religious practice and civil obligation.[15] It has

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[14] See generally McConnell, *Origins*, at 1466-1473.

[15] Professor Ellis West, a critic of free exercise exemptions, offers three reasons why the practice of exemptions from conscription should not be understood to support a more general principle. Ellis West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J. L. & Relig. 367, 376-377 (1994). None of the reasons withstands scrutiny. First, he points out that "the exemptions were granted by legislatures, not courts." *Id.* at 376. Of course. The exemptions of the colonial and revolutionary periods took place before the Constitution (even before the state constitutions), and before judicial review. The point of this pre-constitutional history is to understand the experience against which the framers and ratifiers would view the proposed Amendment.

Second, West notes that "persons seeking exemptions * * * did not necessarily argue that the legislatures were legally or morally bound by either natural law or a constitution to grant the

been suggested that these were granted as a matter of "sympathy," political influence, or other public policy concerns rather than out of a respect for the principle of freedom of conscience,[16] but the language used belies this suggestion. For example, when the Continental Congress recommended exempting from conscription those "who, from religious principles, cannot bear arms," it did so to avoid "violence to their consciences."[17] See Witte, *supra* note 9, at 389-394, for numerous examples of the invocation of "liberty

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exemptions." *Id.* at 376. Prior to adoption of formal constitutional protections, people made whatever arguments they could. Their principal argument was that the legislature should not violate religious conscience (as West's own evidence demonstrates, see, *e.g.*, *id.* at 387-391). West's assumption that dissenters' use of terms such as "privilege" and "indulgence" proves they were not making claims of right (*id.* at 377) is anachronistic. The term "privilege" is a constitutional term meaning "right," as is evident in the language of the Privileges and Immunities Clause of Article IV. The term "indulgence," in English legal usage, simply meant "exemption." See McConnell, *Origins*, at 1428 & n.95.

Third, West asserts that "even when specific constitutional provisions were cited as the reasons for granting exemptions one cannot infer that the exemptions were sought as 'rights' in the modern sense of the word." Rather, he says, such provisions "were thought of as statements of goals or ideals that a government was obligated to realize as much as it could." West, *Exemptions*, at 377. The framers may not fully have grasped the idea of judicially enforceable "rights" in its modern form, but there is no historical basis for reducing the Bill of Rights to the status of goals or ideals, and certainly no reason for giving the rights of free exercise less legal protection than other provisions of the Bill of Rights.

[16] *E.g.*, Hamburger, *supra*, at 929; West, *Exemptions*, at 376-377.

[17] Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 189 (W. Ford, ed. 1905, photo. reprint 1968).

of conscience" in the years preceding the Constitution. To be sure, at this juncture, the principle of liberty of conscience was not a *constitutional* principle (how could it be?); it was, nonetheless, the same principle of political morality that was later embodied in the First Amendment. The *means* by which this principle had been effectuated in the recent past (including exemptions from generally applicable civil obligations) informed the expectations of the framers and ratifiers about the meaning of the principle when it was constitutionalized in the First Amendment.

The relative lack of controversy over the Free Exercise Clause in the First Congress (in marked contrast to its establishment counterpart) may be attributable to the fact that every state in the Union (with the exception of Connecticut, which continued to operate under royal charter) had adopted some version of a Free Exercise Clause in its state constitution by 1789. It is reasonable to infer that most framers and ratifiers expected the Clause to mean roughly what similar provisions had meant at the state level.

The state constitutional provisions typically were lengthier and more detailed than the federal. While their precise language varied, almost all of them had a common structure: a guarantee of free exercise (or liberty of conscience), coupled with a caveat or proviso limiting the scope of protection.[18] The New York Constitution of 1777, for example, provided:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[19]

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[18] Each of the provisions quoted below, and the other state constitutional provisions, can be found in Benjamin Poore, ed., FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (1878), and are reprinted in McConnell, *Origins*, at 1456-1457 & n.242.

[19] The terms "discrimination" and "preference" in this provision

The New Hampshire Constitution of 1784 provided:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, * * * provided he doth not disturb the public peace, or disturb others, in their religious worship.

The Maryland Declaration of Rights of 1776 provided:

> [N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.

The Georgia Constitution of 1777 provided:

> All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.

The existence of these "peace and safety" provisos strongly suggests that the state constitutional provisions were understood to require exemptions for religious conscience. In a regime where all generally applicable laws are enforced even against contrary religious conscience, there is no need to specify that the right should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State" (quoting the New York provision). In such a regime, the provisos would be redundant. Only if religious conscience *overrides*

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did not delimit the scope of the liberty, but ensured that the liberty would be extended nonpreferentially to all denominations. To the extent that the lack of constitutional protection against generally applicable laws has the effect of "plac[ing] at a relative disadvantage those religious practices that are not widely engaged in" (*Smith*, 494 U.S. at 890), this violates the spirit of *equality* as well as *freedom* evinced by these early provisions.

generally applicable law (at least in some cases) do the provisos have legal significance.

Under this interpretation, the state clauses announce a broad right of free exercise of religion — superior to ordinary legislation just as freedom of speech and just compensation for takings of property are superior to ordinary legislation — but exclude from this freedom certain essential laws of the state: those protecting basic public order and the rights of others. (In some states, a broader class of laws is exempted from the free exercise protection, typically laws relating to licentiousness or immorality.[20]) By the same token, Madison, the principal author of the First Amendment, stated late in life that free exercise should prevail "in every case where it does not trespass on private rights or the public peace."[21] These formulations are strikingly similar to the Religious Freedom Restoration Act, except that instead of specifying particular categories of law that override free exercise rights, the drafters of RFRA chose to speak of laws that serve a "compelling interest." In practical application, it is likely that the "compelling interest" test will protect much the same class of religious practice that would have been protected under Madison's approach, or under the "peace and safety" provisos of the state constitutions.

One legal historian has offered an alternative interpretation of these provisos. Hamburger, *supra* note 9. Professor Hamburger challenges the above interpretation on two grounds. First, he claims that rather than defining the scope of protected religious exercise, "[t]he caveats reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfull its functions." *Id.* at 918. In other words, the caveats permitted states to withdraw religious freedom *altogether* from those whose *beliefs or actions* (!) threatened the peace and safety of

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[20] See McConnell, *Origins*, at 1462-1466, for a fuller discussion of these differences, and the political theory underlying them.

[21] Letter from James Madison to Edward Livingstone (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON, *supra*, at 98, 100.

the state. See *id.* at 919 ("instead of implying that the right of free exercise was very extensive * * * the caveats stated the conditions upon which religious liberty could be denied"). Second, Hamburger claims that the "peace and safety" provisos were not understood as limited to basic public order, but encompassed any and all "violation of law." *Id.* at 918.

Before considering the evidence contradicting this interpretation, we pause to note that it offers religious exercise far less protection than it has ever received in this country, and less protection than it receives under *Smith*. Not only are believers obliged to obey all civil law under this interpretation, but if their "beliefs" (not to mention their "actions") are thought to "threaten the capacity of civil society to fulfill its functions," the government is not limited to punishing specific injurious acts, but may suppress the religions that inspire them. As noted below, such an approach was proposed — unsuccessfully — by anti-Catholic forces in New York to permit suppression of that religion. Under Hamburger's view, provisions that history generally regards as a great advance for religious liberty were no advance at all.

Moreover, the Hamburger interpretation is inconsistent with the text of all but a few of the state provisions.[22] For example, when the New York provision stated that "the liberty of conscience, hereby granted, shall not be so construed as to excuse

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[22] Admittedly, the language of a few provisions, such as those of the New Jersey Constitution of 1776 and the South Carolina Constitution of 1778, are susceptible to Hamburger's narrow reading, though there is no evidence (and he presents none) that they were actually read so restrictively. Interestingly, in 1790, while ratification of the First Amendment was in progress, South Carolina adopted language inconsistent with the Hamburger interpretation: "the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Even assuming that Hamburger is correct about the meaning of the older language, therefore, it is evident that the narrow view of free exercise reflected by that language was in retreat by the time of framing and ratification of the First Amendment.

acts of licentiousness, or justify practices inconsistent with the peace or safety of this State," it did *not* mean that violators of law would forfeit their religious liberty, but only that their religious liberty did not "excuse" or "justify" certain types of illegal act. Other provisions stated that a believer should not be "restrained" or "molested" for his religious acts "provided he doth not disturb the public peace" (New Hampshire), or "unless, under colour of religion, any man shall disturb the public order" (Maryland), or "provided it [the exercise of religion] be not repugnant to the peace and safety of the State" (Georgia). The language of these provisions makes clear that the caveats permit the state to punish specific religiously motivated conduct that is inconsistent with public order; contrary to Hamburger, the caveats do not authorize the states to abrogate all religious liberty for religions the authorities deem dangerous.

The drafting history of two of the state provisions — those of New York and Virginia — confirm our interpretation that the provisos delimit the scope of the liberty (thus indicating that the provisions entailed at least some exemptions from generally applicable laws) rather than authorizing the state to suppress religions. In New York, anti-Catholic forces led by John Jay made repeated unsuccessful attempts to exclude Catholics from protections of the state's free exercise provision. Their first attempt was a proposal that read:

> that free Toleration be forever allowed in this State to all denominations of Christians without preference or distinction and to all Jews, Turks, and Infidels, other than to such Christians or others as shall hold and teach for true Doctrines, principles incompatible with and repugnant to the peace, safety and well being of civil society in general or of this state in particular[,] of and concerning which doctrines and principles the legislature of this State shall from time to time judge and determine.[23]

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[23] This account of the New York drafting history, including all quotations, is taken from John W. Pratt, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 84-90 (1967). See also Charles Z. Lincoln, THE CONSTITUTIONAL

If it had been adopted, this provision would have meant precisely what Hamburger contends the actual state provisions meant: that "[t]he caveats reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions." Hamburger, *supra*, at 918. The New York constitutional drafting committee, however, *rejected* Jay's draft, proposing instead that "the free toleration of religious profession and worship shall forever be allowed to all mankind," without limitation. Jay then repeated his attempt on the floor of the Convention, in similar language; but it was again defeated. He substituted a proposal that would deny civil and religious rights to "professors of the religion of the church of Rome" until such time as they were willing to "renounce and believe to be false and wicked" various doctrines regarding papal authority. This was defeated by a vote of 10-19. After that defeat, Jay proposed an entirely different proviso, limiting the scope of the liberty but not restricting its availability: "provided that the liberty of conscience hereby granted, shall not be construed to encourage licentiousness, or be used in such manner as to disturb or endanger the safety of the State." Supporters of free exercise remained suspicious. Gouverneur Morris inquired whether it was the same as Jay's earlier efforts. Only after the majority was persuaded that Jay's new proposal was *not* a restatement of the old was it seriously considered — and even then, the language was tightened to ensure that the proviso referred only to overt actions.[24] This drafting history shows conclusively that the Hamburger interpretation was expressly considered and rejected in New York.

In Virginia, George Mason and James Madison proposed alternative versions of a free exercise provision. Mason proposed "that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, * * * unless under color of religion any man disturb the peace, the happiness, or

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HISTORY OF NEW YORK (1906).

[24] Jay did succeed in adding anti-Catholic, but legally meaningless, language to the preamble of the religious freedom provision.

safety of society."[25] Madison objected to this proposal on two grounds: that it referred to "toleration" and that the state interest proviso was too expansive. Madison proposed a substitute that read that "all men are equally entitled to the full and free exercise of religion according to the dictates of conscience." With minor variation, this was adopted. He also proposed that the caveat be altered to read: "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." The Mason proposal was more restrictive than that adopted by any state other than Delaware; the Madison proposal was more liberal than that adopted in any other state. In the end, the Virginia legislators compromised the proviso issue through silence, adopting the expansive "free exercise" language with no proviso. Presumably, the legislators expected the meaning to lie somewhere between the two extremes set forth by Mason and Madison, and thus to resemble the provisions of the other states.

This episode is highly suggestive for two reasons. First, it suggests that the federal Free Exercise Clause, also drafted originally by Madison and lacking an express "peace and safety" proviso, was expected, like Virginia's free exercise clause, to strike a middle ground between extremely broad and extremely narrow understandings of countervailing governmental interests. Second, it casts further doubt on the Hamburger hypothesis that the provisos authorized suppression of dangerous religions. If Hamburger's interpretation were correct, then George Mason (traditionally regarded as a great civil libertarian) was in favor of a provision that would allow suppression of any religion thought inconsistent with the "happiness" of the state, and elimination of the proviso, rather than being a compromise between the two proposals under consideration, would have amounted to adoption of a view more liberal even than Madison's. Given the tenor of the debate, these conclusions are highly improbable, rendering the premise equally improbable.

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[25] The proposals and speeches quoted in text may be found in Sanford Cobb, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491-492 (1902).

The most persuasive interpretation of the state precursors of the Free Exercise Clause, therefore, is that they provided substantive protection for religious conduct, except for acts that violate the peace and safety of the state, or the rights of others. That is strikingly similar to RFRA.

B. Between The Bill Of Rights And The Civil War, Judicial Interpretations Of The Free Exercise Principle Were Divided

The courts of five states decided claims for exemptions from generally applicable law during the years between ratification of the Bill of Rights and the Civil War. In two states, exemptions were required under state constitutions; in two states, exemptions were rejected; and in one state, the exemption was denied on the facts without clear statement of law.[26] The only federal free exercise case prior to 1879 was *Permoli* v. *Municipality No. 1*, 44 U.S. (3 How.) 588 (1845), in which the Court held only that the Free Exercise Clause does not apply to state governments.[27]

New York. The earliest state court decision expressly addressing the exemption question was *People* v. *Philips*, Court of General Sessions, City of New York (June 14, 1813), published in William Sampson, THE CATHOLIC QUESTION IN AMERICA (1813, photo. reprint 1974), excerpted in *Privileged Communications to*

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[26] We do not discuss cases involving blasphemy prosecutions, religious tests for testimonial competence, or intrachurch property disputes. Although parties in these cases often raised free exercise claims, they were not claims for exemption from formally neutral laws, and the cases bear more resemblance to modern establishment claims.

[27] It is nonetheless significant that counsel for the city in *Permoli* defended the challenged regulation (a ban on open casket funerals in the French Quarter of New Orleans) on public health grounds, arguing that the restriction was justified by "the law of necessity." 44 U.S. at 601 (argument of counsel). This is roughly equivalent to RFRA's compelling governmental interest test. That argument would have been unnecessary and irrelevant if the *Smith* interpretation of free exercise had been in effect.

Clergymen, 1 Cath. Lawyer 199, 199-209 (1955). A Catholic priest refused to testify in a criminal trial to revelations made by the defendant during confession. The four-judge court, presided over by DeWitt Clinton, mayor of the City, presidential candidate in 1812, and future governor of the State, unanimously ruled that the free exercise clause of the New York Constitution prohibited enforcement against the priest of the generally applicable requirement to give evidence in response to a subpoena. The court interpreted the "peace and safety" proviso of the state constitution as inapplicable, on the ground that the Catholic sacrament of confession does not have a "natural tendency * * * to produce practices inconsistent with the public safety or tranquillity." *Privileged Communications*, *supra*, at 208. The court concluded:

> Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.[28]

Four years later, another New York court accepted the priest-penitent privilege established in *Philips*, but denied the motion of a criminal defendant to bar testimony of a Protestant clergyman on the ground that the clergyman had no objection, under the canons of his church, to testifying.[29] Shortly thereafter, the New York legislature codified the priest-penitent privilege, commenting that the *Philips* decision "is believed to have received general approbation in this country."[30] The New York statute became the national model.

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[28] *Id.* at 209.

[29] *People* v. *Christian Smith*, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), reprinted in *Privileged Communications*, *supra*, at 209.

[30] *Extracts from the Original Reports of the Revisers*, REVISED STATUTES OF THE STATE OF NEW YORK (1836).

Massachusetts. In 1818, the Supreme Judicial Court of Massachusetts rejected the motion of a criminal defendant to exclude evidence of an open confession he had made to the congregation. *Commonwealth* v. *Drake*, 15 Mass. 161 (1818). The prosecutor argued that the confession was "purely voluntary" and was not made pursuant to "any known ecclesiastical rule." *Id.* at 161-162. Because the court's opinion did not reveal whether the decision was based on the facts or on the law, the court's interpretation of free exercise is not ascertainable. It is significant, however, that the reported argument for the prosecution was confined to the factual question whether the confession was religiously compelled, and did not challenge the defendant's interpretation of the state constitution as compelling exemptions in the case of actual religious conflict.

Pennsylvania. In *Commonwealth* v. *Wolf*, 3 Serg. & Rawle 48 (Pa. 1817), the Pennsylvania Supreme Court rejected the claim of a Jewish merchant who sought an exemption from the state's Sunday closing law.[31] The court reasoned that Jewish law did not compel him to work on Sunday and the civil law did not require him to work on Saturday, thus, there was no conflict between religious and civil obligations. As in the Massachusetts case, the court did not dispute the claimant's interpretation of the state constitution as compelling exemptions in cases of actual conflict.

Fourteen years later, however, in *Simon's Executors* v. *Gratz*, 2 Pen. & W. 412 (Pa. 1831), the Pennsylvania Supreme Court squarely held that the liberty of conscience clause does not excuse religious believers from compliance with state law. The court declined to follow the New York *Philips* precedent, concluding that exemptions from generally applicable law are properly a matter of

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[31] An earlier free exercise case was settled before appellate review. *Stansbury* v. *Marks*, 2 Dall. 213 (Pa. 1793). The trial court fined a Jewish witness for refusing to testify on the sabbath, but before the issue could be reviewed by the appellate court, the party waived the benefit of this testimony and the fine was discharged.

legislative policy. *Id.* at 414.[32] "That every other obligation shall yield to that of the laws, as to a superior moral force, is a tacit condition of membership in every society, whether lay or secular, temporal or spiritual, because no citizen can lawfully hold communion with those who have associated on any other terms." *Id.* at 417. This statement reads as if it were a deliberate counterpoint to James Madison's famous *Memorial and Remonstrance*, which affirmed that religious duty "is precedent both in order of time and degree of obligation, to the claims of Civil Society," and that "every man" who becomes a member of civil society "must always do it with a reservation * * * of his allegiance to the Universal Sovereign."[33]

In *Specht* v. *Commonwealth*, 8 Pa. 312 (1848), the Pennsylvania court again rejected a free exercise challenge to a Sunday closing law. The court reiterated the holding of *Simon's Executor*, but then proceeded to rule that the law imposed no more than "an incidental worldly disadvantage" on the claimant and that only if the individual were religiously compelled both to work six days a week and also to observe a day other than Sunday as the sabbath would the court "regard[ ] [this] as an invasion of his conscientious conviction." *Id.* at 326.

Virginia. In *Commonwealth* v. *Cronin*, 1 Quart. L. J. 128 (Va. Richmond Cir. Ct. 1855), a Virginia court relied, *inter alia*, on the New York *Philips* case to find a free exercise exemption under the Virginia Declaration of Rights. A man accused of murdering his wife sought testimony from her priest that, he contended, would prove she was involved in an adulterous relationship. The court found that the priest-penitent privilege is

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[32] The author of the opinion, Chief Justice John Bannister Gibson, is best known for his rejection of constitutional judicial review. *Eakin* v. *Raub*, 12 Serg. & Rawle 330, 344-358 (Pa. 1825) (Gibson, J., dissenting). The emphasis in *Simon's Executor* on division of authority between court and legislature, rather than on the nature of free religious exercise, suggests that the two opinions were jurisprudentially connected.

[33] See pages 8-9, *supra*.

"embraced in the guarantees furnished by our Constitution in favor of religious toleration" and that this exemption did not "violate any principle of public policy." "It is impossible to conceive of more broad and comprehensive terms than are used in our Bill of Rights, and our State and Federal Constitutions," the court observed. *Id.* at 137.

South Carolina. In 1823, the Constitutional Court of South Carolina unanimously rejected a claim by a member of the Covenanters sect for exemption from service on the grand jury. *State* v. *Willson*, 13 S.C.L. (2 McCord) 393 (1823). The court observed that all religions required "a ready obedience to the laws of the country" and held that a "fixed and scrupulous moral objection to the discharge of a duty required by law, which springs conscientiously from the religious tenets of a man, [does not] amount[ ] to a justification for refusing to perform the duty so required." *Id.* at 394, 396.

C. The Framers And Ratifiers Of The Fourteenth Amendment Understood It To Extend To Laws Of General Applicability

In this section, we will show that (whatever may have been the understanding at the Founding) the framers of the Fourteenth Amendment understood and intended the principle of free exercise of religion to extend to all coercive acts of government, including those formally neutral toward religion.[34]

Fourteenth Amendment constitutionalism has its origins in the abolitionist movement. Abolitionism was closely tied to the religious revival known as the Second Great Awakening, and the abolitionists were particularly sensitive to denial of religious freedom to African Americans in the South. One of the most shocking aspects of slavery, according to prominent abolitionists, was that the southern states denied both slaves and free persons of color rights essential to Christian religious practice: the ability to read (which barred access to the holy scriptures), to assemble for

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[34] For more detailed discussion of this issue, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

worship or otherwise, and to preach and spread the gospel.[35] John Bingham, principal author of the Fourteenth Amendment, James Wilson, Chair of the House Judiciary Committee at the time of the Amendment, Lyman Trumbull, author of the Civil Rights Act of 1866, and many other leaders in the effort to secure the rights of black citizens after the Civil War, made speeches denouncing such laws on the ground that they were violations of religious conscience.[36] The abolitionist movement also attacked laws against assisting slaves on the ground that those laws violated the liberty of conscience. Bingham, for example, stated:

> Before [the Fourteenth Amendment], a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread. * * * The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution.[37]

None of these laws was "specifically directed" at religion; yet they were routinely characterized by the framers of the Fourteenth

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[35] See *id.* at 1133-1137 and sources cited therein.

[36] *Id.* at 1146.

[37] Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871). The final sentence of this passage reflects Bingham's theory that the most serious deficiency in the original Constitution was the lack of congressional enforcement authority for the Privileges and Immunities Clause of Article IV. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993). As this passage shows, Bingham believed that the Fourteenth Amendment remedied this deficiency. This would protect against the violations of conscience to which Bingham referred, however, only if the incorporated free exercise right is understood to apply to generally applicable laws.

Amendment as violating the liberty of conscience. When the framers of the Fourteenth Amendment extended the protections of the First Amendment to state laws, it was these examples of free exercise violations that they had in mind.

The exemptions issue became the subject of explicit debate in the Reconstruction Congress in connection with the bill that ultimately was enacted as the Civil Rights Act of 1875. In its earlier versions, the Act would have outlawed discrimination (including segregation) within a variety of institutions, including inns, railroads, places of public accommodation, cemeteries, benevolent institutions, *and churches*.[38] Since this bill was not "specifically directed" at religion, but extended to all comparable organizations, including "benevolent institutions," it would not raise a free exercise problem under the rule of *Smith*. A number of distinguished members of Congress, however, including Matthew Carpenter (who argued the first Supreme Court case under the Fourteenth Amendment), Oliver Morton, and Frederick Frelinghuysen, argued that this restriction violated the First Amendment.[39] "People have a right to say how they will worship, what they will worship, and with whom they will worship, and if they have a right to say how they will worship, and with whom they will worship, then under the Constitution of the United States you cannot pass this provision with regard to churches," said Morton.[40] "I look on it as an infringement of the Constitution," said Frelinghuysen.[41]

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[38] See Lash, *supra* note 36, at 1154; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1050-1051 (1995).

[39] Cong. Globe, 42d Cong., 2d Sess. 759 (Sen. Carpenter); *id.* at 847-848 (Sen. Frelinghuysen); *id.* at 898 (Sen. Morton); see also *id.* at 897-898 (Sen. Corbett); *id.* at 897 (Sen. Anthony); *id.* app. at 10 (Sen. Saulsbury); *id.* app. at 5 (Sen. Lot Morrill).

[40] *Id.* at 898 (Sen. Morton).

[41] *Id.* at 896. In contrast to both *Smith* and RFRA, Frelinghuysen argued that the Free Exercise Clause protects only

Charles Sumner, the sponsor of the bill, argued that since it was not directed at religion but rather imposed a neutral principle of law upon all incorporated associations, the bill was not unconstitutional:

> To my mind this is simply a proposition to apply to an incorporated association the great principles of our Government, and it does not in any respect interfere with religion, or tend in the least that way.[42]

Thus, the two views of the Free Exercise Clause — that of RFRA, and that of *Smith* — were clearly presented, and were debated in expressly constitutional terms. Sumner's view — the view taken in *Smith* — lost, and the bill was amended to exclude churches from its scope.[43] This is strong evidence that, at least by the time of Reconstruction, the principle of free exercise was understood to apply to all laws that infringed on religious practice, and not just to those targeted at religion.

III. RFRA Is Consistent With The Great Majority Of This Court's Precedents Interpreting The Free Exercise Clause

It cannot be said that the rule of *Smith* — that the Free Exercise Clause provides no protection against formally neutral laws of general applicability — is deeply rooted in this Court's interpretations of the First Amendment. Indeed, the Court's first statement of that rule occurred only in 1940, in Justice Frankfurter's opinion for the Court in *Minersville School District* v. *Gobitis*, 310 U.S. 586, 595 (1940). *Gobitis* was overruled three years later, in *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S.

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acts of "worship" and not all "external conduct." *Id.* at 847.

[42] *Id.* at 896; see also *id.* at 611; *id.* at 823-826; *id.* at 843 (Sen. Sherman).

[43] *Id.* at 899. The vote was close (29-24), but this is because opponents of the entire Civil Rights bill voted against the amendment in order to make the measure as "obnoxious" as possible, as they frankly admitted. *Id.* at 897 (Sen. Trumbull); *id.* at 897 (Sen. Thurman).

624 (1943). In no other majority opinion prior to *Smith* did the Court hold that the Free Exercise Clause does not apply to generally applicable laws, and even the author of *Gobitis* later abandoned that position.

To be sure, in several cases prior to *Gobitis* the Court rejected free exercise claims — but not on the ground that the laws complained of were neutral or generally applicable. In *Reynolds* v. *United States*, 98 U.S. 145 (1879), the Court relied on the proposition — rejected in *Smith* and contradictory to the plain language of the Amendment — that the First Amendment extends its protection to matters of "religious belief and opinions" but not to "practices." *Id.* at 166; see also *id.* at 164. That *Reynolds* did *not* distinguish between "generally applicable" laws and laws "specifically directed" at religion is evident from its extension in subsequent cases to laws *specifically directed* at the Mormon religion. *Davis* v. *Beason*, 133 U.S. 333 (1890) (upholding requirement that voters take an oath that they are not members of an organization that teaches polygamy); *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1 (1890) (upholding a statute revoking the charter of the Mormon Church and confiscating its property).

In *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), the Court held that child labor laws prohibited, and the Free Exercise Clause did not protect, the right of a nine year old Jehovah's Witness to distribute religious literature in the company of her guardian. The Court made no reference to the general applicability of the statute; indeed, it plainly stated that the law would be unconstitutional if applied to adults. *Id.* at 167. Rather, the Court concluded that "[t]he zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political, or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children * * * to face." *Id.* at 169-170. *Prince*'s analysis of the free exercise right thus bears no resemblance to that of *Smith*.

In several cases involving indirect forms of military service, the Court rejected free exercise claims. See *Hamilton* v. *Regents*, 293 U.S. 245 (1934) (free exercise objection to ROTC requirement at state university rejected); *United States* v. *MacIntosh*, 283 U.S. 605 (1931) (denial of naturalization on ground of refusal to commit

to fight upheld). In none of these cases did the Court invoke anything resembling the *Smith* interpretation of free exercise; the opinions emphasized, instead, the extraordinary importance of military obligations. *Hamilton*, 293 U.S. at 262-263; *MacIntosh*, 283 U.S. at 620-621.

It was in these cases that four of the most highly regarded Justices ever to serve on this Court — Chief Justice Hughes and Justices Holmes, Brandeis, and Stone — had this to say about the principles and traditions of the Free Exercise Clause:

> [I]n the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. * * * One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. * * * The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.

MacIntosh, 283 U.S. at 633-634 (Hughes, C.J., dissenting). RFRA stands in this tradition — what Hughes called "our happy tradition" (*id.* at 634) — of avoiding "unnecessary clashes" between religious conscience and civil law, by granting exemptions in cases where the government has no compelling interest in coercing obedience.

In *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961), the Court upheld application of a Sunday closing law to a Jewish merchant on the ground that it constituted "only an indirect burden on the exercise of religion," by which the Court meant a law that makes the religious practice more costly but not illegal. The Court hastened to add — confusingly — that even "indirect" burdens may

be unconstitutional if the "purpose or effect of a law is to impede the observance of one or all religions." *Id.* at 607. The Court also imposed a requirement of least restrictive burden even with respect to "indirect" burdens. In these respects, RFRA can best be understood as a tightening of the *Braunfeld* standard.

Indeed, no Justice in *Prince*, *Braunfeld*, or the military cases interpreted the Free Exercise Clause as exempting generally applicable laws from judicial scrutiny. Even Justice Frankfurter, in *Braunfeld*, retreated from his position in *Gobitis*. In the case of a neutral and generally applicable law, he stated that the court should apply a balancing test: "If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained." *McGowan* v. *Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring in *Braunfeld* and related cases); see also *id.* at 520.

In 1963, the Court formally adopted the constitutional test now embodied in RFRA. *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972), the Court stated that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[44] Between *Sherbert* and *Smith*, the Court applied that test in at least ten cases. See *Church of the Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520, 564-571 (1993) (Souter, J., concurring) (discussing cases). As Justice Scalia characterized the precedent in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original): the Court has "held that the Free

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[44] The *Smith* opinion distinguished *Yoder* on the ground that it was a "hybrid" case — a combination of free exercise and parental rights. 494 U.S. at 881-882. That was not the basis for decision set forth in the *Yoder* opinion. In any event, every free exercise claim can be characterized as a "hybrid" with some other constitutional claim: free speech, privacy, property, and so forth.

Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." See also *Edwards* v. *Aguillard*, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) (characterizing five cases as holding that "in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations").

* * * *

The interpretation of the Free Exercise Clause reflected in RFRA, therefore, is based on the plain language of the constitutional provision, accords with the historical evidence regarding the First and Fourteenth Amendments, and is consistent with the great weight of precedent. Plainly, Congress has engaged in a reasonable, well-supported, nonpretextual attempt to enforce the requirements of the Fourteenth Amendment.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court, U.S.
FILED
JAN 10 1997
OFFICE OF THE CLERK

No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P. F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. (1992) 6

The American Bar Association ("ABA") respectfully submits this brief *amicus curiae* in support of Respondents pursuant to Rule 37.3 of the Rules of the Supreme Court. Consent to the filing of this brief has been granted by counsel for all parties *via* a stipulation previously lodged with the Clerk and a letter of consent from the United States filed simultaneously herewith.

INTEREST OF *AMICUS CURIAE*

The ABA, with more than 350,000 members across the United States, is the leading national membership organization of the legal profession. Its members include prosecutors, public defenders, attorneys in private practice, federal and state trial and appellate judges, legislators, law professors and students, and non-lawyer associates in related fields. Many ABA members, as well as the Association itself, have an interest in this case because the Religious Freedom Restoration Act ("RFRA") is a critically important legal tool for protecting religious liberty. In addition, the decision in this case could have a far-reaching impact on the ability of lawyers to help individuals protect their civil rights and civil liberties pursuant to a wide array of federal statutes passed through Congress' exercise of the same constitutional authority used to enact RFRA.

The ABA's strong support of RFRA derives from its long-standing commitment to the preservation of First Amendment freedoms, including religious liberty. After RFRA initially was proposed in 1990, the ABA adopted a policy supporting enactment of legislation that would require federal and State governments to "demonstrate that any law interfering with the free exercise of religion is (1) essential to furthering a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." The ABA's policy rests on the conviction that only by limiting governmental interference with the exercise of religion to those instances where government can demonstrate an urgent need

to do so can we protect the principles of religious liberty and tolerance on which this country was founded and for which it is unequalled elsewhere in the world. The ABA concluded that the compelling interest test is also the most practical means for ensuring that smaller and unpopular faiths receive the same level of protection as mainstream faiths. RFRA, as enacted in 1993, is consistent with the ABA's policy.

The ABA's interest in this case is based further upon the fact that RFRA is being challenged on grounds that implicate numerous other ABA policies supporting federal legislation enacted pursuant to Section 5 of the Fourteenth Amendment. If the challenge to congressional authority to adopt such legislation is successful in this case, it could cast doubt on the validity of voting rights provisions; statutory prohibitions against race, sex, age, and disability discrimination in housing, employment, education, and public accommodations, including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972; and numerous other laws designed to enhance the protection of individual rights.

Because of the ABA's longstanding involvement in these areas, and the broad spectrum of practice areas and interests of the national ABA membership supporting ABA policies that might be affected by the Court's decision in this case, the ABA has a special perspective to provide as *amicus curiae*.[1]

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[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act preserves and advances the principles of religious liberty and tolerance on which this nation was founded. The statute is an appropriate exercise of Congress' authority to enhance the protection of individual rights by prohibiting neutral rules with discriminatory effects where the judicial branch has declined to prohibit such rules. It also is carefully framed to protect a core constitutional right without impairing legitimate state interests or violating the Establishment Clause.

RFRA is a recent example of Congress' well established authority under the Constitution to protect individual rights. Prior to enacting RFRA, Congress employed its power under Section 5 of the Fourteenth Amendment to enact laws protecting a wide array of rights, including free speech and the free exercise of religion, and to protect against discrimination based on race, religion, gender, disability and age. This Court repeatedly has recognized Congress' power to enact such protective laws in situations where the Court has construed the Constitution as not requiring judicial protection.

It is vital that the Court continue to recognize Congress' power to protect individual rights under Section 5. A departure from this Court's long established precedent regarding Congress' Section 5 power would undermine a pillar of the American legal system and jeopardize a large number of statutes that have become integrated into the fabric of the law. This Court should affirm Congress' power to protect individual liberties through enactment of RFRA and similar statutes based on Congress' Section 5 power.

ARGUMENT

A bedrock principle of American government is that Congress, as well as the courts, has responsibilities for protecting individual rights. The cornerstone of this principle historically has been found in Section 5 of the Fourteenth Amendment. RFRA, which Congress enacted to protect and enhance individual religious liberty, is the latest example of Congress' appropriate use of its Section 5 power. In a series of historic statutes, Congress has protected individuals from discrimination based upon race, gender, religion, disability, and age and has promoted free speech and the free exercise of religion. Indeed, the civil rights advances of the last thirty years are in large part the result of Congress' appropriate and effective use of its authority. Protection of individual rights through Congress' Section 5 power now has become a fundamental part of American jurisprudence.

The statute, its legislative history, and this Court's precedents all provide ample demonstration of RFRA's constitutionality. Recognizing that the briefs of Respondents and other *amici* discuss these issues extensively, this brief first addresses only a few key elements of the constitutional challenges to the statute itself. It then discusses the possible ramifications of the decision in this case for other statutes that enhance the protection of important individual rights.

I. THE RELIGIOUS FREEDOM RESTORATION ACT IS WITHIN THE CONSTITUTIONAL AUTHORITY OF CONGRESS

The Religious Freedom Restoration Act clearly is a proper exercise of Congress' power to enforce the Civil War Amendments. *First*, RFRA protects the performance of religiously motivated acts, a goal that is within the scope of the First Amendment. *See Employment Division v. Smith*, 494

U.S. 872, 877 (1990) ("the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532-33 (1993) ("if the object of a law is to infringe upon or restrict practices because of their religious motivation . . . it is invalid unless justified by a compelling interest"). RFRA does not begin to test the outer boundaries of Congress' Section 5 power because this Court always has recognized that freedom to engage in religious practices is a fundamental constitutional right.

Second, it was appropriate for Congress to strike a balance in RFRA in favor of individual rights that is different from what the Court established in *Smith*. In *Smith*, the Court expressed concern about the dangers of "deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order" and reasoned that a host of laws protecting health, property, safety, or any other legitimate state interest could be suspended if the compelling state interest test were to be applied to neutral rules of general applicability. *Smith*, 494 U.S. at 888. The Court had expressed a similar concern in *Washington v. Davis*, 426 U.S. 229 (1976):

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white.

Id. at 248. Yet in *Davis* the Court recognized that even if judicial enforcement of a disproportionate impact rule is not appropriate, congressional enforcement would be wholly appropriate: "[E]xtension of the rule beyond those areas where it is already applicable by reason of statute, such as the field of public employment, should await legislative prescription." *Id.*

When Congress enacted RFRA, it was aware of the concerns raised by the Court in *Smith*; Congress heard testimony regarding the potential effects of the proposed legislation and weighed the societal benefits and burdens that might be posed by the statute. *See generally Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992). On balance, Congress determined that the societal benefits of imposing the compelling state interest test outweighed the costs. The Court traditionally has deferred to congressional decisions that such costs are acceptable in order to protect individual rights. The Court's analysis in *Davis* demonstrates that Congress acts within its proper role, as defined by separation of powers principles, when it prohibits neutral rules that the courts have not disallowed.

Third, the standard adopted by Congress in RFRA is mindful of state interests. Numerous lower courts applying RFRA have recognized that strict scrutiny is not "fatal" to every government action to which it is applied, *Adarand Constructors v. Pena*, 115 S.Ct. 2097, 2117 (1995), and have

upheld many governmental actions challenged under RFRA.[2] Indeed, it is very much an open question whether the municipal zoning law here at issue substantially burdens a person's religious conduct, whether the City will be able to demonstrate a compelling aesthetic and historical interest, and whether there is a less restrictive means of achieving its interest.[3]

Finally, RFRA broadly disavows any construction of its terms to violate the Establishment Clause, *see* 42 U.S.C. § 2000bb-4 (1994), and does not upset the balance this Court has struck in interpreting the Religion Clauses. Within the framework of the well established three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court's decisions "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2492 (1994).

For example, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987), this Court upheld Section

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[2] *See, e.g., Daytona Rescue Mission, v. Daytona Beach*, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (municipal zoning regulations prohibiting homeless shelters and food bank programs without special use permit not a substantial burden and city had compelling interest); *Thiry v. Carlson*, 78 F.3d 1491, 1495-96 (10th Cir. 1996) (condemnation of gravesite not a substantial burden), *cert. denied*, 117 S. Ct. 78 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1522-23 (11th Cir. 1995) (Freedom of Access to Clinic Entrances Act not a substantial burden on protestors' free exercise of religion).

[3] The ABA takes no position on these or other issues that go to the ultimate merits of the underlying claim.

702 of Title VII, which exempts religious institutions from Title VII's prohibition of religious discrimination in employment, and stated: "the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." The Court in *Amos* held that the first prong of the *Lemon* test, requiring laws to serve secular purposes, "does not mean that the law's purpose must be unrelated to religion." *Id.* at 335. Rather, the Court emphasized that avoiding interference with religious exercise is a permissible legislative purpose. Avoiding such interference is exactly the purpose of RFRA.

Nor does RFRA have the principal or primary effect of advancing religion. As with the statutory exemption in *Amos*, "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." *Id.* at 337. RFRA lifts many regulations that burden religious exercise and no objective observer surveying the "text, legislative history, and implementation of the statute" could conclude that RFRA endorses religion. *See id.* at 348 (O'Connor, J., concurring in the judgment). Finally, RFRA does not entangle government and religion any more than the Court's current application of the compelling interest test in cases involving governmental classifications based on religion. *See Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (compelling state interest test applies to governmental classifications based on religion).

II. THE AMERICAN LEGAL SYSTEM RELIES ON CONGRESS' POWER TO PROTECT INDIVIDUAL RIGHTS

Nothing less than the current allocation of power among the branches of government and the authority of Congress to protect individual rights is at stake in this case. The Court long has recognized Congress' authority under Section 5 of the Fourteenth Amendment to protect individual liberties. Relying on this Court's precedents, Congress has enacted a wide variety of statutes protecting individual liberties. The American people also have come to rely on these federal statutes to prohibit discrimination and encourage toleration in many aspects of civic life, especially in their relationship with government.

A departure from precedent in this area would create enormous uncertainty in a settled area of constitutional law.[4] If RFRA is invalidated, a wide range of federal civil rights statutes could be called into question. At the very least, RFRA's demise would result in immediate challenges across the Nation to Title VII's disparate impact provision as applied to religious exercise and to the Americans with Disabilities Act, *see infra*, thereby unsettling important reliance interests. For example, government employees who have relied on federal law for twenty-five years to require accommodations for their religious exercise (rules regulating clothing and workdays, for example), could well find themselves facing a choice between continued employment and fidelity to their religious practices.

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[4] Already, some federal statutes that enhance the protection of individual rights have been challenged because *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (limiting commerce power), has focussed attention on Congress' Section 5 authority.

In enacting RFRA, Congress did what it has done many times before: enhanced the protection of individual rights under its power to enforce the Civil War Amendments in situations where the Court has construed the scope of constitutional protection more narrowly. This Court has upheld the validity of such statutes in cases involving voting rights, equal protection rights, and incorporated constitutional rights.

A. Voting Rights

In a series of voting rights cases, the Court has upheld statutes that prohibit literacy tests and other facially neutral practices that have discriminatory effects. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court upheld a provision of the Voting Rights Act of 1965 that temporarily suspended literacy tests in States or political subdivisions with less than fifty percent voter registration, even though the Court in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), specifically had declined to prohibit States from conditioning the suffrage right on literacy tests. *South Carolina v. Katzenbach* held that the power to enforce the Civil War Amendments enables Congress to prohibit a state action the Court previously had upheld as constitutional.

The Court subsequently applied *South Carolina v. Katzenbach*, a Fifteenth Amendment case, to hold that under Section 5 of the Fourteenth Amendment Congress may extend the ban on literacy tests. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding provision of Voting Rights Act prohibiting use of literacy test as condition of voting for persons who had completed sixth grade in Puerto Rican schools); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding extension of ban on literacy tests to whole country). The federal statutes prohibiting literacy tests are very similar to

RFRA: in both situations Congress has prohibited neutral rules that have the effect of discriminating even though the Court had previously upheld the facially neutral rules.[5]

Petitioner invites this Court to overturn the "substantive power" holding of *Katzenbach v. Morgan*. *See* Pet. Brief at 41. This request is unnecessary. RFRA protects a right that is textually grounded and forcefully protected under this Court's precedents against intentional religious discrimination. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532-33 (1993). Congress has not created a new right out of whole cloth; rather, it has employed a familiar tool--the compelling interest test--for rooting out discrimination that it deems is likely to result from a neutral rule. The precedent for such congressional action was established before *Katzenbach v. Morgan* in *South Carolina v. Katzenbach* and since has been reaffirmed.

For example, in *City of Rome v. United States*, 446 U.S. 156 (1980), the Court held that Congress could prohibit changes in electoral schemes with discriminatory effects even as it held, the same day, in *Mobile v. Bolden*, 446 U.S. 55 (1980), that such schemes do not, of themselves, violate the Fifteenth Amendment. *City of Rome* also made clear that

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[5] It has been suggested that the ban on literacy tests differs from RFRA in that Congress has enhanced the standard applied to free exercise cases in RFRA, whereas the ban on literacy tests applied the Court's Fifteenth Amendment standard but reached a different result from the Court in concluding that literacy tests should be prohibited. *See* Pet. Brief at 33. This attempted distinction is incorrect. By prohibiting literacy tests, Congress enhanced the legal standard applied to literacy tests as an abridgement of voting rights from a very lenient standard requiring a demonstration that the test was being used for discriminatory purposes, *see Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), to a *per se* rule of invalidity.

Congress' enforcement powers under the Fourteenth and Fifteenth Amendment are coextensive: the Court decided the case on Fifteenth Amendment grounds while relying on Fourteenth Amendment cases. *See City of Rome*, 446 U.S. at 176-77; *see also id.* at 207 n.1 ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive.") (Rehnquist, J., dissenting on other grounds). Thus, it is well established in the voting rights context that Congress may enhance the protection of constitutional rights by prohibiting neutral rules that have discriminatory effects.[6]

B. Equal Protection Rights

Beyond the voting rights context, Congress frequently has employed its power under Section 5 of the Fourteenth Amendment to enact numerous statutes that enforce a variety of other equal protection rights. These statutes show that Congress plays an important role in determining which classes of people merit greater protection against arbitrary discrimination and in devising appropriate remedies. Moreover, these statutes show that Congress already has protected religious exercise as an equal protection right.

In 1972, Congress employed its Section 5 power to extend Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, to apply to the States.

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[6] In other race-related areas, the Court repeatedly has upheld federal statutes that enhance the protection of individual rights as valid exercises of Congress' Thirteenth Amendment power. *See Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968); *Ex Parte Virginia*, 100 U.S. 339 (1879). The Thirteenth Amendment enforcement power is coextensive with the other Civil War Amendment enforcement powers. *See Fullilove v. Klutznick*, 448 U.S. 448, 500-01 (1980) (Powell, J., concurring) (treating all three enforcement powers as coextensive).

See Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) ("[t]here is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment"). The 1972 Amendments are significant here for three reasons. First, Congress effectively elevated gender as a protected class before this Court had done so. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (elevating scrutiny) (plurality); *Craig v. Boren*, 429 U.S. 190 (1976) (same). This Court upheld the 1972 amendments as a valid Section 5 measure in *Fitzpatrick*, a case alleging gender discrimination by a State, thus recognizing Congress' role in enhancing the protection for a class of persons. Second, Title VII's prohibition of religious discrimination applies to the States under the 1972 amendments, demonstrating Congress' Section 5 power to protect the free exercise of religion. Third, the disparate impact provision of Title VII, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 42 U.S.C. § 2000e-2(k) (1994) (codifying disparate impact law as part of Civil Rights Act of 1991), prohibits neutral rules with discriminatory effects even though the Court held in *Washington v. Davis*, 426 U.S. 229 (1976), that government employment rules violate the Equal Protection Clause only when a discriminatory purpose is proved.[7] The disparate impact provision of Title VII is nearly identical to RFRA in its prohibition of neutral rules that infringe upon free exercise.

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[7] In *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court held that disparate impact claims under Title VII may be pursued against a State. Although the Court did not address Congress' power in *Teal*, no member of the Court questioned Congress' power to prohibit the States from enforcing neutral employment rules with discriminatory effects in spite of *Davis*.

Congress again prohibited religious discrimination in Title IX of the Education Amendments of 1972, which prohibits public colleges from discriminating on the basis of "race, color, religion, sex or national origin." *See* 42 U.S.C. § 2000c-6 (1994). Title IX is based in part on Congress' Section 5 power. *See* 42 U.S.C. § 2000d-7 (1994) (amending Title IX and other statutes under Congress' Section 5 power so as to abrogate the States' Eleventh Amendment immunity); *Franklin v. Gwinnett County Public Sch.*, 112 S. Ct. 1028, 1038 n.8 (1992) (damages remedy is available under Title IX whether the statute was enacted under the spending power or Section 5 power). Although Title IX does not prohibit neutral rules that unintentionally discriminate, should RFRA be invalidated on the basis that Congress cannot play a role in determining which classes merit equal protection legislation, Title IX could be challenged. *See, e.g., Doe v. University of Illinois*, Civ. No. 96-1129 (C.D. Ill. 1996) (holding that *Seminole Indian Tribe* casts doubt on spending power as basis for Title IX but upholding Title IX as valid Section 5 statute), *appeal docketed*, No. 96-3511 (7th Cir. Oct. 4, 1996).

Congress further has employed its Section 5 power to ensure equal protection of the laws in the field of disability rights. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101-13 (1994), which prohibits discrimination in employment and public services, explicitly relies on Congress' Section 5 power. *See id.* at § 12101(b)(4). As with RFRA, the ADA requires government to make accommodations to generally applicable rules, *see id.* at § 12112(b)(5)(A) (defining "discrimination" as "not making reasonable accommodations" to the needs of the disabled), even though the courts might not require such accommodation. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (a disability classification is upheld as long as it rationally furthers a legitimate governmental interest); *Washington v. Davis*, 426 U.S. 229 (1976).

Similarly, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994), which prohibits discrimination against the disabled by the recipients of federal funds, was enacted pursuant to Congress' Section 5 power. *See Welch v. Texas Highways & Public Transp. Dep't*, 483 U.S. 468, 472 n.2 (1986); 42 U.S.C. § 2000d-7 (1994) (amending the Rehabilitation Act and other statutes by abrogating the States' Eleventh Amendment immunity); 132 Cong. Rec. S10876 (daily ed. Aug. 1, 1985, part II) (statement of Sen. Cranston) (invoking Section 5 power in support of section 2000d-7). The Rehabilitation Act and the ADA would be jeopardized if Congress could not enhance the protection of classes of individuals whose rights it deems especially vulnerable.

Congress also has employed its Section 5 power to prohibit the States from engaging in age discrimination in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1994). *See* 42 U.S.C. § 2000d-7 (1994) (amending the ADEA and other statutes by abrogating the States' Eleventh Amendment immunity); 132 Cong. Rec. S10876 (daily ed. Aug. 1, 1985, part II) (statement of Sen. Cranston) (invoking Section 5 power in support of section 2000d-7). Yet the Court has upheld age classifications under the Equal Protection Clause. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979). Thus, the ADEA will be jeopardized as a departure from *Murgia* and *Vance* if RFRA is invalidated simply because it departs from *Smith*.[8]

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[8] It is significant that in both *Cleburne*, where the Court addressed the equal protection rights of the disabled, and in *Vance*, where it addressed an age classification, the Court noted with approval the role that Congress had played in devising equal protection standards and remedies. *See Cleburne*, 473 U.S. at 443 (citing the Rehabilitation Act with approval); *Vance*, 440 U.S. at 97 n.12 (The ADEA "shows that the political system is working."). (continued...)

These statutes demonstrate the important role that Congress has played in enforcing equal protection rights in situations where the Courts have not thought judicial protection was necessary or constitutionally required. This Court upheld such a statute in *Fitzpatrick* as a valid exercise of Congress' Section 5 power. Striking down RFRA would be inconsistent with *Fitzpatrick* and endanger numerous statutes in which Congress has enhanced the protection afforded to vulnerable classes of persons.

C. Incorporated Constitutional Rights

It has been suggested that RFRA is invalid because Congress' power to protect incorporated rights such as the free exercise right is not coextensive with its power to protect rights such as equal protection that are contained *in haec verba* in the Fourteenth Amendment. *See* Pet. Brief at 41 n.11. However, even if RFRA is not viewed as enforcing an equal protection right, this Court explicitly has recognized the authority of Congress to enforce incorporated rights under its Section 5 power. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court upheld an attorneys' fee award against a State under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994), even though the Eighth and Fourteenth Amendments, standing alone, would not provide for a fee award. *See also United States v. Price*, 383 U.S. 787 (1966)

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[8](...continued)
Indeed, *Cleburne* began its analysis of the equal protection claim by recognizing Congress' important role in equal protection enforcement: "Section 5 of the [Fourteenth] Amendment empowers Congress to enforce this [equal protection] mandate but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." *Cleburne*, 473 U.S. at 439-40 (emphasis added).

("We have no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.'") (quoting *United States v. Williams*, 341 U.S. 70, 72 (1951). Moreover, several federal statutes demonstrate that Congress regularly has employed its Section 5 power to protect incorporated rights.

For example, Congress has protected free speech and free exercise rights in the Equal Access Act, 20 U.S.C. §§ 4071-73 (1994), which requires public secondary schools to allow equal access to students who wish to conduct meetings on school grounds regardless of the "religious, political or other content of the speech at such meetings."[9] In upholding the Act in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court described the statute as expanding the scope of a prior Court decision, *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court had held, on free speech grounds, that a public university must grant religious student groups equal access. In *Widmar*, the Court had expressed reservations about extending its ruling to younger students: "[u]niversity students are, of course, young adults [and] are less impressionable than younger students." *Id.* at 266-67 n.14. But in *Mergens*, the Court found Congress' action extending *Widmar* to younger students unremarkable, noting that "[i]n 1984, Congress extended the reasoning of *Widmar* to public secondary schools." *Mergens*,

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[9] Although this statute limits its *application* to schools that receive federal financial assistance, it disavows any attempt to use Congress' spending power as a constitutional *basis*. *See* 20 U.S.C. § 4071(e) (1994). Because the statute enforces constitutional rights against the States by providing for an individual cause of action rather than by withholding federal dollars, it must be regarded as an exercise of Congress' Section 5 power. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 243, 244 n.4 (1985).

496 U.S. at 235. In fact, the Court recognized that the statute was "enacted in part in response to two federal appellate court decisions" holding that the Establishment Clause prohibited application of *Widmar* to secondary schools. *Id.* at 239. The Equal Access Act therefore enhances the protection of First Amendment rights beyond the parameters of judicial protection, just as RFRA does.

Congress further has protected free speech rights in the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (1994), which prohibits federal or State governmental seizures of work products and documentary materials held for the purpose of public dissemination, even when the government has obtained a warrant. Although based in part upon the commerce power, the portion of this statute that applies to the States must be viewed as an exercise of Congress' Section 5 power given the First Amendment, Fourth Amendment, and due process rights it enforces against the States, *see EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) (application to States of federal statute based on the commerce power may be analyzed under Section 5 power), and given the limits of the commerce power. The Privacy Protection Act was a response to this Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), that the Constitution does not bar police officers acting pursuant to a warrant to search the offices of a newspaper forcibly and without notice. The statute thus enhances the protection of constitutional rights beyond the parameters of judicial enforcement.

Congress has employed its Section 5 power to protect incorporated rights in enacting numerous other statutes as well. *See, e.g.*, 42 U.S.C. § 290dd-2 (1994) (prohibiting state officials from using substance abuse patient records to initiate or substantiate criminal charges against a patient or to conduct any investigation of a patient); 18 U.S.C. § 2511(2)(c) (1994)

(federal wiretap law prohibiting state actions that infringe upon Fourth Amendment rights).

In sum, Congress has enacted a broad range of statutes under Section 5 that enhance the protection of individual rights. Several of these statutes are similar to RFRA in that they prohibit neutral rules with discriminatory effects; nearly all of the statutes are like RFRA in that they prohibit state actions that the Court has construed as not prohibited by the Constitution. The invalidation of RFRA therefore would jeopardize numerous federal laws protecting individual rights.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the Religious Freedom Restoration Act upheld as constitutional.

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Dated: January 10, 1997

JAN 10 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICI CURIAE OF THE MINNESOTA FAMILY COUNCIL, ILLINOIS FAMILY INSTITUTE, INDIANA FAMILY INSTITUTE, MASSACHUSETTS FAMILY INSTITUTE, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, OREGON CENTER FOR FAMILY POLICY, PALMETTO FAMILY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, ROCKY MOUNTAIN FAMILY COUNCIL, ROCKY MOUNTAIN FAMILY LEGAL FOUNDATION AND NORTHSTAR LEGAL CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are a group of statewide nonprofit organizations that work to promote and strengthen the family through improving public policy and educating the public. Amici view strong protection for religious liberty through the Religious Freedom Restoration Act (RFRA) as an important way to protect the family. Amici are responding to the brief submitted by the sixteen States and Territories that urges this Court to find RFRA unconstitutional. Descriptions of the amici are in the Appendix. Consent letters are on file at the Clerk's Office.

SUMMARY OF ARGUMENT

Amici urge this Court to uphold the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb *et seq.* (RFRA). This brief responds to the amici brief filed by the sixteen states and territories ("States' Brief"). The amici have great respect for the state attorneys general and the excellent job they do generally. However, their brief in this case mischaracterizes RFRA decisions to argue that courts have used RFRA to impose a variety of intolerable burdens on the states. But in all but one of the RFRA cases cited in the States' Brief, the RFRA claimant lost.

The question before this Court in this case is whether Congress has the constitutional authority to enact RFRA. It is irrelevant to that question whether RFRA has burdened state governments in a practical sense. Additionally, this brief will show that courts have consistently rejected attempts to use RFRA to impose sweeping or extreme requirements or prohibitions on the states.

If this Court declares RFRA to be unconstitutional, amici urges the Court to reexamine its decision in *Employment*

Division v. Smith, 494 U.S. 872 (1990), and give serious consideration to restoring the compelling state interest test as the test for Free Exercise Clause claims.

ARGUMENT

I.

THE LARGE NUMBER OF PRISONER LAWSUITS UNDER RFRA MAY BE A SERIOUS PROBLEM, BUT IT IS NOT A REASON TO DECLARE RFRA UNCONSTITUTIONAL

The States' Brief complains that RFRA has been used to impose federal control over prisons, "disrupt[ing] core functions of state governance." States' Brief at 1. But every case cited by the States' Brief shows that is not happening. The prisoners lost every RFRA case cited in the States' Brief. Courts imposed no injunctions on prison officials because the prisoners lost their RFRA claims. One would expect the States' Brief to have presented the best list of cases in which overzealous courts are afflicting state prisons with onerous RFRA-based injunctions. If those court decisions exist, the States' Brief did not refer to any of them.

The States' Brief claims that RFRA "has been used by racist inmates attempting to cloak their agendas in 'religion,' making it more difficult for corrections officials to limit the disruption and other consequences of such activities." States' Brief at 4. Yet in every case the States' Brief cites for this point, the prisoner lost:

Ochs v. Thalacker, 90 F.3d 293 (8th Cir. 1996) (white prisoner seeks segregation from nonwhite inmates under RFRA due to his white supremacists religious beliefs). **Prisoner lost**.

George v. Sullivan, 896 F.Supp. 895 (W.D.Wis. 1995) (white prisoner sues under RFRA seeking right to receive white supremacist literature). **Prisoner lost**.

United States v. Meyers, 906 F.Supp. 1494 (D.Wyo. 1995), *aff'd.*, 95 F.3d 1475 (10th Cir. 1996) (prison inmate claims right under RFRA to use marijuana). **Prisoner lost**.

The States' Brief also claims that prisoners have used RFRA to "distribute weapons or engage in other dangerous activities . . . ;" and "to frustrate prison restrictions on the use of long hair, medallions and 'colors' - gang identifiers." States' Brief at 5. But again, the prisoners who made those claims under RFRA lost the cases cited in the States' Brief.

Rust v. Clarke, 883 F.Supp. 1293 (D.Neb. 1995), *aff'd.*, 84 F.3d 841 (8th Cir. 1996) (prisoner who practices the Viking religion of Asatru asked for various religious items that could be used as weapons). **Prisoner lost**.

Emel v. Mensinger, 1996 WL 468673 (E.D. Pa. 1996) (satanists claimed RFRA right to burn Bibles in their cells). **Prisoners lost**.

Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996) (prisoner who practices a Native American religion sought to keep his hair long and to use a sweat lodge). **Prisoner lost**.

Abordo v. Hawaii, 938 F.Supp. 656 (D.Hawaii 1996) (prisoner who practices a Native American religion objected to being forced to cut his hair). **Prisoner lost**.

Diaz v. Collins, 872 F.Supp. 353 (E.D.Tex. 1994) (prisoner who practices a Native American religion sought to

wear his hair long, obtain a medicine pouch and wear a head band). **Prisoner lost**.

The States' Brief also complains about the amount of prisoner lawsuits, that the prisoners are burdening the States by filing large numbers of RFRA cases. States' Brief at 2-6. The amici are sympathetic with the States' complaints about numerous prisoner cases. Congress enacted on April 26, 1996 the Prison Litigation Reform Act of 1996 (PL104-134, codified at 18 U.S.C. §3626). This law may significantly reduce the number of frivolous lawsuits filed by prisoners, including those filed under laws other than RFRA.

However, excessive prisoner litigation is irrelevant to determining whether Congress has the constitutional authority to pass RFRA or not. It is a policy concern that does not address the constitutional question before this Court.

The problem of excessive prisoner lawsuits did not begin with RFRA. Prisoners have successfully protected their right to petition for redress of grievances, to be free of racial discrimination and to have due process of law, *Turner v. Safley,* 482 U.S. 78, 84 (1987), as well as their Eighth Amendment rights. *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Hudson v. McMillian,* 503 U.S. 1 (1992). If RFRA vanished, prisoners would continue to file lawsuits under a myriad of other constitutional provisions.

The States may find it irritating or draining to fight these lawsuits in court, but a losing RFRA lawsuit does not impose any court order that "disrupt[s] core functions of state governance,"(States' Brief at 1). When courts reject plaintiffs' unreasonable or outlandish interpretations of RFRA, it shows that the system is working. RFRA should not be struck down because some people are allegedly misusing it.

II.

THE STATES' AMICI BRIEF DISTORTS THE RFRA CASE LAW TO PAINT A FALSE PICTURE THAT COURTS HAVE USED RFRA TO INTRUDE ON OTHER AREAS OF STATE AUTHORITY

The States' Brief incorrectly paints a dark and ominous picture of federal courts using RFRA to strip away state authority and to command the states to act according to the dictates of people with bizarre religious beliefs:

> In the three short years since RFRA was enacted, it has disrupted several core functions of State governance. Whether it is running prisons, educating children, defining criminal laws, or exercising other police powers, RFRA has undermined the traditional discretion given to the States in these areas.

States' Brief at 1. This is simply not happening. Of all the RFRA cases cited in the States' amici brief, the religious plaintiff prevailed over the government with a RFRA claim only once. If RFRA is being misused so frequently, why could the States not find any more examples?

The States' main complaint with RFRA is that they have to respond to RFRA suits at all. However, even in areas where the States have the power to impose reasonable regulations (*e.g.*, public schools, traffic, hunting), the States still must obey the Constitution. Successful lawsuits ensure that the States conform their laws to constitutional standards, not to interfere with areas traditionally left to state control.

Each area of law cited in the States' Brief shows the two problems of 1) citing cases in which the RFRA claim lost and 2) failing to acknowledge that state laws can violate the Constitution or federal law.

A. Home Schooling

The States' Brief complains that people have used RFRA to challenge home schooling regulations that enforce "minimal educational standards." States' Brief at 6. That brief refers to a RFRA case in which a home schooling mother unsuccessfully challenged home schooling regulations in Maryland. *Battles v. Anne Arundel County Board of Education*, 904 F.Supp. 471 (D. Md. 1995).

Yet courts have struck down many state home schooling laws because they violated the Constitution. For example, the Michigan Supreme Court used its state Free Exercise Clause to declare unconstitutional a state law requiring all students to be taught by state-certified teachers. *Michigan v. DeJonge*, 501 N.W.2d 127 (Mich. 1993). A number of courts have struck down a series of state compulsory attendance laws applied to home schooling on void for vagueness grounds. *See, e.g., Minnesota v. Newstrom*, 371 N.W.2d 533 (Minn. 1985); *Wisconsin v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983); *Roemhild v. Georgia,* 251 Ga. 569, 308 S.E.2d 154 (1983) and *Jeffrey v. O'Donnell*, 702 F.Supp. 513 (M.D.Pa. 1988) and 702 F.Supp. 516 (M.D.Pa. 1988).

When these courts struck down state home schooling statutes, they were finding that the state laws violated the Constitution. The courts were not interfering with an area traditionally left to the States. From time to time, a legislature will pass a law that violates the constitution, and it will be

challenged in court. RFRA is not the cause of that phenomenon. If RFRA disappeared today, there would still be challenges to state laws regulating home schooling if they are perceived as violating the constitutional rights of the families.

B. Public Schools

The States Brief also argues that RFRA has disrupted the states' oversight of public schools. Again, their brief cites three RFRA cases for this point. Yet in two of them, the plaintiffs making the RFRA claim lost.

In *Bauchman v. West High School,* 900 F.Supp. 254 (D.Utah 1995), a high school student sought an injunction to stop her high school choir from singing some songs with Christian religious content. The student based her main cause of action on the Establishment Clause, which makes this case basically irrelevant to a discussion of RFRA. The district court rejected the Establishment Clause claim, as the Eighth Circuit had done in a similar case, *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980). *See Bachman*, 900 F.Supp. at 267-270.

The student did make a secondary argument that the singing of religious songs also violated her rights under RFRA. The federal court rejected the RFRA claim because the school district allowed the student to opt out of singing the objectionable music. This is the normal relief granted to someone with a religious objection to doing something required of the government -- that the objector is exempted from the requirement:

> As discussed above, plaintiff in the instant case was permitted to be excused from any choir activities which she found to offend her

> religious beliefs. She declined this option, and instead continued to participate in practicing and performing all of the songs in the choir's repertoire, including those which were explicitly Christian religious in nature. In light of the lack of alleged facts demonstrating state coercion in this matter, this court finds that plaintiff has failed to state a claim that her religious beliefs were substantially burdened in violation of RFRA.

Bachman, 900 F.Supp. at 271. Therefore, the school district here was already offering the student the relief (an exemption from singing the objectionable music) that RFRA would have provided.

A federal court again rejected an apparently extreme interpretation of RFRA in *Helland v. South Bend Community School Corporation*, 93 F.3d 327 (7th Cir. 1996). In that case, a teacher filed a RFRA claim in court after a school district removed him from substitute teacher list because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms . The courts rejected the teachers' arguments that he was fired because he exercised his religion appropriately, not because he had done a questionable job as a teacher.

The only RFRA case cited in the States' Brief in which the RFRA claim prevailed over the government was *Cheema v. Thompson,* 67 F.3d 883 (9th Cir. 1995). The States' Brief misleading characterizes this case as using RFRA to create "a federal right to carry daggers to school." States' Brief at 6. A full explanation of the case reveals that the Ninth Circuit did not apply RFRA in such a bizarre way. The plaintiffs in the lawsuit were members of the Sikh religion from India, who

carry ceremonial knives called *kirpans*. The district court allowed the three Sikh students to carry their *kirpans* if they met these conditions:

> 1) the *kirpan* will be of the type demonstrated to the Board and to the District Court, that is: a dull blade, approximately 3 - 3 ½ inches in length with a total length of approximately 6 ½ - 7 inches including its sheath;
>
> 2) the *kirpan* will be sewn tightly to its sheath;
>
> 3) the *kirpan* will be worn on a cloth strap under the children's clothing so that it is not readily visible;
>
> 4) a designated official of the District may make reasonable inspections to confirm that the conditions specified about are being adhered to;
>
> 5) if any of the conditions specified above are violated, the student's privilege of wearing his or her *kirpan* may be suspended; and
>
> 6) the District will take all reasonable steps to prevent any harassment, intimidation or provocation of the Cheema children by any employee or student in the District and will take appropriate disciplinary action to prevent and redress such action, should it occur.

Cheema, 67 F.3d at 886.

Of course, if the school district in this case proved that the *kirpan* was a dangerous weapon that threatened the safety

of other students, then the RFRA claim by the three Sikh students would fail. Only because the majority of the Ninth Circuit panel was convinced that the *kirpan* did not pose a threat to other students was it permitted under RFRA. This is a case respecting the practice of an established world religion, formed centuries ago. This is not a case of RFRA putting weapons into the hands of youth gangs -- the Bloods, the Crips and the Sikhs.

C. Traffic and Hunting Laws.

The States Brief also criticizes RFRA for exposing state and local government to litigation "over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations." States' Brief at 7.

The States' Brief once again cites only cases in which the RFRA claim lost. This shows that the courts did not use RFRA to impose burdensome requirements on the state or local units of government.

In *Osborne v. Power*, 890 S.W.2d 570 (Ark. 1994), the Arkansas Supreme Court rejected the RFRA challenge by a homeowner ordered by local authorities to stop erecting huge Christmas light displays at his home. The Arkansas Supreme Court said "there is nothing about their religious beliefs which dictates that they must celebrate the Christmas season by a massive display of electric lights." *Osborne,* 890 S.W.2d at 572-73.

Similarly, the Ohio Court of Appeals rejected the RFRA argument of an Amish hunter who refused to wear

bright hunter orange clothing while hunting. *State v. Bontrager,* 1996 WL 612397 (Ohio Ct. of App., Oct. 19, 1996). That court found that hunting is not a central tenet of the Amish faith, that the requirement to wear the clothing did not burden the Amish hunter's religious convictions, and that the state had a compelling state interest to protect people from getting shot accidently.

The States in their amicus brief implicitly admit the weakness of their own arguments against RFRA by citing so many cases in which the courts rejected the RFRA claims:

> Whether the States ultimately defeat these claims of course is only half the matter; the fact that Congress has seized authority to legislate in these areas and compelled States to divert substantial resources in defending actions under the legislation itself encroaches on State sovereignty.

States' Brief at 7.

Here, the States basically admit that their main objection is that they do not like to respond to lawsuits based on federal law. But in our federal system, states must obey the Constitution, and litigants will argue in court that a state is violating their federal constitutional rights. And sometimes, the courts will agree that the states have violated the Constitution.

The States' Brief illustrates this point when it cites *State v. Miller,* 549 N.W.2d 235 (Wis. 1996).This is one of the two cases mentioned in the States' brief in which the religious believer prevailed on his religious liberty claim. However, the religious claimant did not win under RFRA, but the Wisconsin Constitution's Free Exercise Clause. *See Miller*, 549 N.W.2d

at 238, n.5.

In this case, the Wisconsin Supreme Court exempted Amish buggy drivers from compliance with a state law requiring slow moving vehicles to attach fluorescent orange triangles to the rear of their buggies. That court found that there was a less restrictive means to accomplish the state's compelling interest in maintaining traffic safety.

This was a state supreme court striking down a state law under its state constitution. The Minnesota and Michigan Supreme Courts have exempted Amish buggy drivers from similar legal requirements because of the state and federal free exercise clauses. *See State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) and *People v. Swartzentruber*, 170 Mich.App. 682, 429 N.W.2d 225 (1988). Although the Amish won their religious liberty exemptions in these cases, these are not extreme intrusions into areas States normally oversee.

Simply because such areas as education, traffic control hunting and zoning (which is at issue in the case now before this Court) have been regulated traditionally by the states, does not mean the states are free ignore constitutional constraints. RFRA is only one of many federal statutes and constitutional provisions that states must obey. This Court has ordered the states to obey federal law and the Constitution in the areas of education, zoning, traffic control and hunting:

Public Education: Public schools must not violate the freedom of speech, *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (student speech) and *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 385 (1993) (equal access); the Equal Protection Clause, *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial discrimination); Title IX of the Education Amendments of 1972, *Franklin v. Gwinnett County*

Public Schools, 503 U.S. 60 (1992); and the Individuals with Disabilities Education Act, *Florence County School District Four v. Carter,* 510 U.S. 7 (1993).

Zoning: Zoning ordinances may not violate the freedom of speech, *Schad v. Mount Ephraim,* 452 U.S. 61 (1981); the Takings Clause, *First Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); Fourteenth Amendment liberty interest in parenting and family, *Moore v. East Cleveland,* 431 U.S. 494 (1977); and the Equal Protection Clause, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) and *Arlington County Board v. Richards*, 434 U.S. 5 (1977).

Hunting - state laws regulating hunting must comply with the Equal Protection Clause and the Privileges and Immunities Clause, *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978); and various federal laws addressing sovereignty of Indian reservations, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Some have even argued unsuccessfully that Sunday closing laws containing restrictions on hunting and fishing regulations violate the Establishment Clause! *McGowan v. Maryland*, 366 U.S. 420, 423 (1961) and *Two Guys v. McGinley*, 366 U.S. 582, 587 (1961).

Traffic regulation - laws regulating traffic must conform with the Commerce Clause, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) and the Freedom of Speech Clause, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) and *Wooley v. Maynard*, 430 U.S. 705 (1977).

Therefore, the fact that States must defend their laws and actions in court and show that they are constitutional is nothing new. It is also appropriate under our constitutional system. RFRA extends that national tradition.

III.

IF THIS COURT FINDS RFRA UNCONSTITUTIONAL, THIS COURT SHOULD REOPEN THE QUESTION OF WHETHER THE COMPELLING STATE INTEREST TEST SHOULD APPLY IN FREE EXERCISE CASES

If this Court declares RFRA unconstitutional, it should revisit its decision in *Employment Division v. Smith,* 494 U.S. 872 (1990) and reexamine whether the compelling state interest test most accurately reflects the protections of the Free Exercise Clause. This issue was not briefed by the parties or the amici in *Smith.*

This Court found in *Smith* that the Framers of the Free Exercise Clause did not intend for it to protect people with religious-based objections to neutral laws of general applicability. *Smith,* 494 U.S. 872, 878-9 (1990).

However, such leading constitutional scholars as Professor Michael McConnell of the University of Chicago Law School, has argued that the Framers of the First Amendment did intend constitutional protection for religious adherents burdened by laws facially neutral toward religion. See M. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion,* 103 Harvard L.Rev. 1409 (1990).

During the three year period (1990-93) before RFRA was enacted and when *Employment Division v. Smith* stated the standard of protection for federal free exercise rights, lower courts misinterpreted *Smith* as a signal that religious liberty now rated as a second-class constitutional right. In *Salaam v. Lockhart,* 905 F.2d. 1168 (8th Cir. 1990), a prisoners' rights

case, the Eighth Circuit made the shocking statement that Americans' free exercise rights after *Smith* were no better than those of prisoners:

> We do not believe that the Supreme Court's recent decision *in Employment Div., Dep't of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), affects our analysis. *Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners.

Salaam, 905 F.2d at 1171. In fairness to the Eighth Circuit, this statement taken in context expresses despair over the state of religious liberty rights of private citizens.

In another prisoners' rights case called *Hunafa v. Murphy,* 907 F.2d 46 (7th Cir. 1990), the Seventh Circuit made a similar statement that following *Smith,* regular citizens had no more religious liberty protection than inmates in prison:

> The defendants have not cited to us the Supreme Court's recent decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), rendered after the appeal in this case was filed. *Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded.

Hunafa, 907 F.2d at 48.

This is hardly encouraging when lower courts view religious liberty protection in such a cramped way. Ten years ago, this Court interpreted the Free Exercise Clause as giving significant discretion to prison officials to restrict the religious activities of prisoners. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (prison rule infringing on religious liberty "valid if it is reasonably related to legitimate penological interests."). The lower courts interpreted *Employment Division v. Smith* as applying that standard to the rest of society. It is difficult to believe that the Framers of the Free Exercise Clause, who fought for individual liberty and limited government, would have intended the Constitution to protect religious freedom for the common man and woman to the same extent that it does prisoners.

The historical intent of the Framers of the Free Exercise Clause cannot be examined in isolation from the intent of the Framers to limit the reach of governmental power. both federal and state. At the time the First Amendment was ratified, federal and state authority regulated far fewer things than they do today. Therefore, there were far fewer areas than today where government regulation would conflict with a person's religious convictions.

For example, the case now before the case probably would have never happened at the time the First Amendment was ratified. It is doubtful that any township at the time had an ordinance to preserve historic buildings. At that time, a church would have no need for protection under the Free Exercise Clause that did not extend to neutral laws of general applicability, because the churches would have been free to demolish and expand their sanctuaries as they saw fit, without any governmental interference.

In another example, the conflict between the Amish and

the public school statutes in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), would not have arisen at the time the First Amendment was ratified because states did not have compulsory attendance laws or public schools. At that time, a family might have been adequately protected by a Free Exercise Clause that did not extend to neutral laws of general applicability, because the families would have been free to educate their children in the manner they thought proper, without any governmental interference.

Because the reach of government has expanded into so many new areas since the drafting of the Constitution, the compelling state interest test may today best reflect the intent of the Framers. The need for the compelling state interest test has increased over the years because individuals need protection from the growing reach of government.

Justice William Brennan made this point about the expanding presence of government in the lives of individuals in a speech in 1985 to Georgetown University Law School:

> But the days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government -- licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated

before this century. . .

Justice William J. Brennan, Jr., Text and Teaching Symposium, Georgetown University, Washington, D.C. October 12, 1985, printed in *The Great Debate: Interpreting Our Written Constitution*, published by the Federalist Society, 1986, p. 19.

Then-Justice Rehnquist, in his dissent in *Thomas v. Review Board*, 450 U.S. 707 (1981), made a similar point:

> . . . the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two clauses, since such legislation touches the individual at so many points in his life.

Thomas, 450 U.S. at 721.

In other words, government has grown so large that it collides with the lives of individuals much more than it did at the time of the framing of the Constitution.

Assuming that *Employment Division v. Smith* accurately lays out the test the Framers of the First Amendment envisioned for the Free Exercise Clause—we are still left with the fact that other parts of the Constitution have changed to allow government to grow far beyond the boundaries envisioned by the Framers.

It is highly unlikely that the reach of governmental power will shrink back to its boundaries of two centuries ago. That means that the *Smith* test leaves individuals defenseless and vulnerable in the face of the oversized governmental behemoth. During the period 1990-1993, after *Smith* was

handed down and before RFRA became law, federal courts almost always ruled against the religious adherent. Unless government gets out of many areas it regulates now, (which probably will not happen), the compelling state interest test offers the individual significant protection from the reach of big government.

CONCLUSION

Amici curiae urges this Court to affirm the Fifth Circuit's decision and uphold the constitutionality of the Religious Freedom Restoration Act, or, to reexamine and expand the protections for religious liberty provided for under the Free Exercise Clause as interpreted by *Employment Division v. Smith,* 494 U.S. 872 (1990).

Date: January 10, 1997

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DESCRIPTION OF AMICI CURIAE

Minnesota Family Council - The Minnesota Family Council is Minnesota's largest nonprofit, nonpartisan, profamily organization. Established in 1983, the Minnesota Family Council addresses a wide array of issues affecting the family though the media, the legislative and legal system and by a statewide newspaper called the Profamily News. The Minnesota Family Council is located in Minneapolis.

Illinois Family Institute is located in Glen Ellyn, Illinois. The mission of the organization is to create within Illinois an environment in which families can flourish by equipping churches and community-based groups to influence public policy, through leadership by example, information and training. Illinois Family Council takes a stand for families and limited government by engaging in research, education, coalition-building, media-outreach, lobbying and legislative tracking.

Indiana Family Institute is an education and research organization dedicated to the preservation and restoration of the family in the home and the public square. The Indiana Family Institute is located in Indianapolis.

Massachusetts Family Institute is a non-profit, pro-family research and education organization. Founded in 1991, we are committed to strengthening the family and restoring Judeo-Christian values to our culture. The Massachusetts Family Institute is located in Newton Upper Falls, Massachusetts.

New Jersey Family Policy Council is a conservative think tank/education research organization dedicated to strengthening

families in New Jersey. Its mission is to strengthen New Jersey families by persuasively presenting a traditional foundation of principles and values essential for the well-being of our society in the public policy arena. It is located in Parsippany, New Jersey.

North Carolina Family Policy Council is an independent, nonpartisan, nonprofit research and education organization that serves as a voice for family and traditional values in North Carolina. The North Carolina Family Policy Council was formed in 1992 and is located in Raleigh.

Oklahoma Family Policy Council is a nonpartisan research, education and communications organization working to strengthen the family in Oklahoma through informed citizenship and improved public policy. It is located in Oklahoma City, Oklahoma.

Oregon Center for Family Policy is a nonprofit, nonpartisan organization dedicated to promote and strengthen families throughout the state. The organization is located in Salem, Oregon.

Palmetto Family Council is based in Columbia, South Carolina and is dedicated to working in the centers of influence to persuasively present Biblical principles on issues affecting the family through research, communication and networking.

Pennsylvania Family Institute is a non-profit, non-partisan research and education organization, which analyzes public policies and cultural trends for their effects on the family. The Pennsylvania Family Institute is located in Harrisburg, Pennsylvania.

Rocky Mountain Family Council is a non-profit educational organization dedicated to strengthening families in Colorado through education, legal assistance, daily radio commentaries, public forums, and monthly publications, including newspaper columns. The Rocky Mountain Family Council was established in 1991 and is located in Arvada, Colorado.

Rocky Mountain Family Legal Foundation is a non-profit public interest law firm located Colorado and is dedicated to representing families, both parents and children, that require assistance in defending their religious liberty and free speech rights. The Rocky Mountain Family Legal Foundation is also active in defending the integrity of the family and parents' rights to raise their family in accordance with the parents' beliefs.

Northstar Legal Center -- The Northstar Legal Center is a division of the Minnesota Family Council. Its mission is to promote traditional values and constitutional freedoms in the legal arena. The Northstar Legal Center is based in Minneapolis and Fairfax, Virginia.

No. 95-2074

FILED
JAN 10 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Respondent-Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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*Consent to the filing of this brief has been granted by counsel for all parties via a stipulation previously lodged with the Clerk and a letter of consent from the United States filed simultaneously herewith.

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Interest of *Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) was incorporated in 1939, for the purpose, *inter alia*, of rendering legal aid, free of charge, to indigent "Negroes suffering injustices by reason of race or color." LDF has appeared in numerous cases before this Court. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a firm with a "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

The lessons drawn by LDF and other civil rights litigators who have confronted discrimination on a case-by-case basis -- *e.g.*, (1) that there are myriad and ingenious ways in which prejudice may be cloaked in neutral garb, *see, e.g., Lane v. Wilson*, 307 U.S. 268, 275 (1939); (2) that requiring proof of discriminatory motive makes such litigation both difficult and divisive, *see, e.g., Mobile v. Bolden*, 446 U.S. 55, 134-35 (1980) (Marshall, J., dissenting); and (3) that facially "neutral" practices often yield harms indistinguishable from those resulting from intentional discrimination, *see, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) -- have long informed Congress' judgment about what civil rights legislation is "appropriate," often supporting enactment of statutes that forbid unjustified unequal treatment, without requiring proof of invidious motive (*see, e.g.*, 1991 Civil Rights Act, Pub. L. 102-166; Voting Rights Act, 42 U.S.C. § 1973). The Legal Defense Fund -- and the Nation -- have a strong interest in affirmation of the validity of such laws and of Congress' power under the Reconstruction Amendments to act decisively to protect Americans' rights.

LDF's experience is relevant to this case in one further respect: LDF attorneys served as counsel in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the decision reaffirming this Court's authority as primary expositor of the Constitution, and LDF participated as *amicus curiae* in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), which held the

government's "fundamental, overriding interest in eradicating race discrimination in education," *id.* at 602, to outweigh an asserted religious right to discriminate. While critics of the statute now before the Court have claimed those precedents to be implicated here, LDF is convinced that the Religious Freedom Restoration Act may and should be upheld without compromising the principles for which those cases stand.

Summary of Argument

The Religious Freedom Restoration Act (RFRA) is an "appropriate" exercise of Congress' authority to "enforce . . . the provisions" of the Fourteenth Amendment. This Court has long read Section 5 to endow Congress with power to enact any measure "carry[ing] out the objects" of the Reconstruction Amendments, so long as it "tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights." *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880). RFRA easily passes that test. It creates a real safeguard for the right of religious Free Exercise secured against the States by the Due Process Clause, *see Employment Div. v. Smith*, 494 U.S. 872 (1990), and it supplies needed protection against unequal treatment of minority groups whose practices are unpopular or misunderstood.

To cloud its validity, RFRA's opponents have proposed various doctrinal means -- including overruling *Katzenbach v. Morgan*, 384 U.S. 641 (1966) -- whereby the Court might rein in congressional power. These drastic revisions have no warrant in the text, structure, or original meaning of the Reconstruction Amendments; and far from supplying the "special justification" that must accompany departure from precedent, developments since *Morgan* only weigh in its favor. *Morgan* and like decisions have enabled Congress to play a central role in protecting basic civil rights, allowing federal courts to adhere to a restrained role. That salutary arrangement is consistent with the letter and spirit of the Constitution. It ought not lightly be scuttled.

ARGUMENT

RFRA is "Appropriate" Legislation Enforcing the Fourteenth Amendment

A. RFRA is Plainly Within Congress' Enforcement Authority

For more than a century, this Court's cases have emphasized the breadth of the authority conferred upon Congress to "enforce by appropriate legislation" the guarantees of the Reconstruction Amendments. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). Specifically, the standard for testing the validity of an exercise of an "enforcement" power has been held to be no different from that used to decide whether a law is "necessary and proper," *see* Art. I, § 8, cl. 18, to the execution of one of Congress's other enumerated powers:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1880) (quoted in *South Carolina v. Katzenbach*, 383 U.S. 301, 327(1966)); *accord City of Rome v. United States*, 446 U.S. 156, 174 (1980) ("Congress's authority under § 2 of the Fifteenth Amendment, [is] no less broad than its authority under the Necessary and Proper Clause"); *see also Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (Court need only to "perceive a basis" for exercise of enforcement power).[1]

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[1] *Compare McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

These principles are fully consistent with the text, history, and purposes of the Reconstruction Amendments, *see infra*, and they are entirely sufficient to sustain RFRA.

RFRA's detractors have argued that the Act's "ends" are not "legitimate," suggesting that the Act is not truly "remedial," either because it reaches conduct, *i.e.* that authorized by certain "neutral laws of general application," whose constitutional validity under *Employment Div. v. Smith*, 494 U.S. 872 (1990), is plain; or, more plausibly, that it is not "plainly adapted" to those ends, because the degree of such "overbreadth" is unacceptably high.

As for the first, any suggestion that a law loses its "remedial" character when it sweeps in conduct that is not in itself prohibited by the Constitution has been rejected even by Justices dissenting in enforcement power cases, *see, e.g.*, *City of Rome*, 446 U.S. at 209 (Rehnquist, J., dissenting) ("It has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the Amendments' commands"), and similar arguments have been firmly rejected in related settings, *see, e.g.*, *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950) (antitrust remedy may prohibit conduct that is "entirely proper when viewed alone").

Even the less extreme indictments of RFRA's breadth are defective, for they: (1) severely overstate the extent to which the statute reaches beyond the area of constitutional protection and also the consequences of falling within the Act's reach; (2) slight Congress' substantial expertise in designing civil rights remedies; and (3) overlook altogether the ways in which RFRA's breadth affirmatively advances important objectives related to "the enjoyment of perfect equality of civil rights," *Ex Parte Virginia*, 100 U.S. at 346.

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adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional").

1. Congress Could Reasonably have Determined that RFRA was Needed to Safeguard the *Constitutional* Guarantee of Religious Free Exercise

Suspicion about RFRA's *bona fides* as enforcement of the *Smith* Free Exercise right appears to rest on one or more of the following suppositions: (1) that the gap between the constitutional right and the statutory guarantee is large; (2) that "real" violations of the Constitutional guarantee (*i.e.*, laws "targeting" religious practices) are infrequent and easily detected; and/or (3) that the consequences of coverage are grave. None of these is fully correct.

First, although the majority opinions in *Smith* and *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520 (1993), place laws "targeting" religion at the center of the Free Exercise Clause's concern, it bears emphasis that *Smith* recognized two other situations in which heightened scrutiny is warranted as a matter of constitutional law: when "hybrid" rights are burdened, 494 U.S. at 882, and when the challenged action involved "individualized" consideration, *id.* at 884. Indeed, *Smith* gives no indication that these categories are to be conceived narrowly, *see id.* at 882 (noting that it is "easy to envision" a "hybrid" claim rooted in the right to Free Association -- even though the Court apparently has never decided a case explicitly on mixed, religion and association, grounds); *see also Bowen v. Roy*, 476 U.S. 693, 708 (1986) (Burger, C.J., concurring) (in an individualized determination case, "refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent"). Any determination of RFRA's "overbreadth" would need to take into account the full range of situations to which, consistent with *Smith*, heightened constitutional scrutiny is still applicable.[2]

---

[2] Indeed, the facts of this case, involving denial of a congregation's (associational) right to worship together and the extinction of an owner's right to develop property as he sees fit, might well qualify for heightened constitutional scrutiny as a "hybrid." There might also be

Similarly, no "overbreadth" judgment could rest on the (supposed) paucity of recent instances of deliberate targeting: assuming for argument's sake that the number of such cases is modest, infrequency could as well be an indication of the efficacy of the deterrents (*i.e.*, the *Sherbert* test and, later, RFRA) as of the rarity of the offense.

Also plainly relevant to the reasonableness of Congress's judgment are the consequences of any statutory overbreadth. While *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved federal statutes that operated to void certain State laws that, by hypothesis, would have been upheld judicially, RFRA is not so rigid. Rather, RFRA gives governmental defendants an opportunity to defend their laws under a standard that produces substantial convergence, if not complete overlap with the Constitution's requirement.[3]

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issues as to whether the law creating the landmark district is sufficiently "general" to qualify for *Smith*'s safe harbor or whether the process by which building permits are granted and denied may be treated as an "individualized exemption" regime. Significantly, these latter sorts of issues are highly fact-intensive, and their full litigation requires substantial resources. A lone individual might have far more difficulty bringing such a case -- or persuading an attorney to do so -- than might a well-established church.

[3]*See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J.) ("purpose" of strict scrutiny is to "smoke out" illegitimate motives); *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983) (ADEA "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them"); *cf. South Carolina v. Katzenbach*, 383 U.S. at 331 (noting that Voting Rights Act provided for "the possibility of overbreadth").

While some practices may fall under RFRA that would have survived under the *Smith* regime, that would likely be a consequence of the Act's shift in the burden of persuasion (and the risk of nonpersuasion) from plaintiffs to defendants. While Petitioner

In the end, acknowledging the significance of factors such as likelihood of detection, litigation costs, and likelihood and cost of error underscores the point that ensuring enforcement of the Free Exercise guarantee involves characteristic elements of legislative competence and expertise. Not only is Congress best equipped to register and balance the relative dangers of over- and under-deterrence, but it does so informed by long experience drafting and overseeing statutes securing civil rights and civil liberties.[4]

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suggests that with such a shift in burden, Congress has "turn[ed] day to night," Br. at 20, this Court's cases counsel a more restrained view, *see City of Rome*, 446 U.S. at 214 (Rehnquist, J., dissenting) (in light of "difficulties of proving [intent] . . . Congress could properly conclude that as a remedial matter it was necessary to place the burden of proo[f]" on government defendants); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995) ("Congress can eliminate . . . a particular element of a cause of action that plaintiffs have found it difficult to establish").

Moreover, even laws incorporating a rule that outlaws discriminatory effects (without regard to a jurisdiction's motives), are not inappropriate remedial measures. Such laws typically implicate a second -- and fully legitimate -- sort of remedial power: the authority to address the persisting effects of *past* discrimination; *see, e.g., Gaston County v. United States*, 395 U.S. 285, 296 (1969) ("impartial" literacy test "fair[ly]" administered, may be suspended, so as to deny effect to past discrimination in education); *see also The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (noting Congress's unquestioned authority to "enact appropriate legislation correcting the effects of . . . prohibited state laws"). That strand of the legislature's remedial power is not implicated in this case.

[4]*See Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring) ("Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration

Seen in this light, the "appropriateness" of RFRA's main innovation -- providing a cause of action that depends on (relatively easy to detect) burdens on practice, rather than on the (more elusive) "generality" *vel non* of the law imposing the burden -- should not be second-guessed. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 423 ("where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department").

2. RFRA Also Effectuates Core Concepts of Equal Protection

a. RFRA Provides Protection for Minorities

As much as the Act was meant to supply a fully effective safeguard for the constitutional immunity from laws "prohibiting the free exercise of religion," RFRA's text, structure, and legislative history disclose a distinct, complementary statutory purpose: to assure *equal* treatment for "*all*," *see* 42 U.S.C. § 2000bb(b), equally weighty religious claims. When this aim is taken into account, RFRA's breadth ceases altogether to be ground for constitutional suspicion and instead weighs powerfully in its favor, as reflecting the wholly legitimate concern (explicitly acknowledged in *Smith*, amply recorded in history and familiar, no doubt, from congressional experience) that a system in which accommodations of religious practice must be obtained, one at a time, through the political process poses a deep threat to unpopular, uncommon, or poorly understood religious faiths -- and to principles of equality, in general. *Cf. Larson v. Valente*, 456 U.S. 228, 245-46 (1982) ("'There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'") (citing *Railway*

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and enactment of earlier legislation").

Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

If the testimony heard by Congress before RFRA's enactment made one point above all others, it was that the consequences of the *Smith* rule -- *i.e.*, a regime in which any protection for religious exercise beyond the modest constitutional minimum was a matter of legislative grace -- would bear unequally on adherents of "minority" religions, typically "discrete and insular" groups whose ability to influence the political process is negligible and whose ways are most likely misunderstood by the societal mainstream.[5]

But even if Congress had held no such extensive hearings, the threat of unequal treatment is patent enough to be the subject of judicial notice, *see, e.g.*, *Goldman v. Weinberger*, 473 U.S. 503, 512 (1986) (Stevens, J. concurring) (stressing "interest in uniform treatment for the members of all religious faiths" and noting danger that, an Orthodox Jew's claim to wear a yarmulke might be accommodated, while "a similar claim on behalf of a Sikh or a Rastafarian

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[5]*See, e.g., Religious Freedom Restoration Act, Hearings Before the Senate Committee on the Judiciary*, 102nd Cong., 2d Sess. 5-7 (1992) (testimony recounting officials' refusal to respect objection, grounded in Hmong religion, to performance of autopsy). In many cases, although not always, these groups are racial and ethnic minorities who face additional prejudice and misunderstanding on those grounds. *See, e.g., Clay a/k/a Ali v. United States*, 403 U.S. 698 (1971) (Black Muslim); *Yang v. Sturner*, 780 F. Supp. 558 (D.R.I. 1990) (Hmong); *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) (African American Jehovah's Witness); OSHA Notice CPL 2 (Nov. 5, 1990) (revoking exemption from hard hat rule for Sikhs); *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994) (Santeria); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) (Native Americans); *Robinson v. Foti*, 527 F. Supp. 1111, 1113 (E.D. La. 1981) (Rastafarian). *See generally* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 749 & n.659 (1996) (gathering congressional testimony).

might readily be dismissed"), or, as *Smith* put it: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. Indeed, those legislators who voted on RFRA no doubt had an additional frame of reference: their own experience in trying, in piecemeal fashion, to provide protection for religious practices. *See* House Hearings at 123 (Rep. Solarz) ("we as experienced legislators should realize" that without RFRA "religion will be subject to the standard interest group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading"). *See Edwards v. Aguillard*, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting). *See also Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring) ("A group petitioning for a law may never get a definite response, or may get a "no" based not on the merits, but on the press of other business or the lack of an influential sponsor").[6]

Nor are considerations of equal treatment matters for casual concern: a regime in which individuals with essentially similar religious claims receive different treatment from government would be a constitutional violation, *see generally*

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[6]Although true "uniformity" is likely an unattainable ideal even in the courts, *see Goldman* at 512 (Stevens, J., concurring) (stressing difficulty of articulating a robust standard); *but cf. Adarand v. Peña*, 115 S. Ct. 2097, 2113 (1995) ("strict [judicial] scrutiny does take 'relevant differences' into account"), the Congress that enacted RFRA was surely justified in concluding that the judicial branch was a more promising forum from which to seek principled, consistent decisions than the legislature. *See also Kiryas Joel*, 114 S. Ct. at 2491 (noting that legislature's failure to act is generally not reviewable).

Kiryas Joel, 114 S. Ct. at 2497 (O'Connor, J., concurring),[7] which a conscientious member of Congress would have the unquestioned power and responsibility to correct under section 5 of the Fourteenth Amendment. *See generally Larson*, 456 U.S. at 245 ("Free exercise . . . can be guaranteed only when legislators -- and voters -- are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations").

Although it remains possible for State governments to avoid such Equal Protection problems themselves, *see, e.g.*, R. I. Gen. Law § 42-80.1-3 (1993), and theoretically possible for courts to adjudicate claims of denial of equal treatment on a case-by-case basis, *see, e.g., Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989) (Ginsburg, J.), Congress was fully justified in believing that equality would be inadequately protected at the local level, *see Croson*, 488 U.S. at 523 (Scalia, J., concurring) ("[D]iscrimination against any group finds a more ready expression at the state and local than at the federal level"), and that norms of equal treatment would go underenforced if left to judicial Equal Protection analysis, *see Olsen*, 878 F.2d at 1470-71 (Buckley, J., dissenting).

As to the latter, imposing obstacles would stand in the way of any individual challenging legislative *failure* to provide a religious accommodation on Equal Protection grounds, *see Kiryas Joel*, and a successful challenge to the grant of an exemption to another religious claimant presumably would require persuasive proof: (1) that the two claims were comparably sincere; (2) that the burdens on religious practice were similarly substantial; and (3) that the

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[7] "[T]he Religion Clauses, the Free Exercise Clause, the Establishment Clause, the Religious Test Clause . . . and the Equal Protection Clause . . . all speak with one voice on this point: absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."

government policies were similarly amenable to modification. *Cf. United States v. Armstrong*, 116 S. Ct. 1480 (1996) (discussing required Equal Protection showing). And even where a religious claimant could discharge that burden, of course, she would run the risk that the relief ordered would be to strike down the existing accommodation, rather than enlarge the beneficiary class, *see Olsen*, 878 F.2d at 1464; *Califano v. Jobst*, 434 U.S. 47, 56 n.14 (1977); *see generally* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979) -- a result almost certain to foster acrimony among adherents of different religions and deepen hostility to already unpopular religious groups. Under the circumstances, Congress could easily have determined that even the most meritorious claims to equal treatment would go unenforced, and that a uniform, national standard was the necessary and appropriate answer.

b. RFRA Further Assures Equal Protection of Fundamental Rights and Promotes Impartial Governance

RFRA has additional Equal Protection dimensions as well. In enacting the statute, Congress codified its determination that "laws 'neutral' toward religion may burden religion as surely as laws intended to interfere with religious exercise," 42 U.S.C. § 2000bb(a)(2). This finding, the product of Congress's unquestioned fact-finding competence, is in no way subversive of *Smith* -- which held that the constitutional bar on "law[s] . . . prohibiting free exercise" supplies authority for invalidating only the second kind of law, but did not purport to decide that the *effects* of both sorts of law are fundamentally different (*i.e.*, that the burdens of a neutral law are easier to bear). And RFRA reflects a further, equally reasonable, congressional judgment: that even if it is permissible to draw some distinction between individuals harmed by "neutral" action and those burdened by "non-neutral" laws, equality principles

impose a limit on inequalities of legal entitlement that may permissibly be grounded on that distinction.

There are three ways in which that determination might be understood to "elaborate upon the direct [Equal Protection] command of the Constitution," *Oregon v. Mitchell*, 400 U.S. at 296 (Stewart, J.). First, Congress could have decided that laws based on indifference or insensitivity to, or misunderstanding of, religion, although perhaps not unconstitutional in themselves, come close enough to the antagonistic laws banned by the First Amendment of its own force to warrant prohibition. *Cf. Lukumi*, 508 U.S. at 524 (noting that defendant "officials . . . did not understand, failed to perceive, or chose to ignore" their obligation not to target religious practice).

Or Congress might have determined that religious practice is so intertwined with belief that the governmental duty of impartiality properly extends to the latter, along with the former, *see, e.g.*, 42 U.S.C. § 2000e(j) (duty of employment nondiscrimination on account of religion includes obligation "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice").

Finally, without questioning whether the distinction drawn in *Smith*, between individuals burdened by non-neutral laws and those who shoulder the "incidental" burdens imposed by neutral ones, is necessary or sensible *as a matter of First Amendment interpretation*, Congress was permitted to conclude, *as a matter of Equal Protection*, not to allow vast inequalities of legal right to rest on that distinction. *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880-82 (1985) (State law that does not violate the Commerce Clause may be struck down as "discriminatory" under the Equal Protection Clause); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (the fact that felon disenfranchisement is not closely scrutinized under the "fundamental rights" prong of Equal Protection, *see Richardson v. Ramirez*, 418 U.S. 24 (1974), does not insulate it from invalidation for having a

discriminatory purpose). *See also Morgan*, 384 U.S. at 654 n.15 (noting that Court's "cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, and Congress is free to apply the same principle in the exercise of its powers") (citations omitted).

The same principle applies to other legislation whereby Congress has undertaken (through exercise of Article I and Section 5 powers), to impose a standard of equal treatment that the judiciary has not held the Constitution of its own force to require. *Compare, e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12201 *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) *with Cleburne* (classifications based on mental retardation do not warrant heightened scrutiny); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*) (age); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (pregnancy); *compare also Washington v. Davis*, 426 U.S. 229 (1976) (disparate impact alone does not violate Equal Protection) *with Connecticut v. Teal*, 457 U.S. 447 (1982) (applying Title VII disparate impact standard to State defendant).

Such laws express "the prevailing sense of justice in this country," *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989), and have become part of the "warp and woof of civil rights law," *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 696 (1978). As is explained *infra*, such legislation acknowledges that judicial enforcement of principles of equality often reflects the unavoidable limitations of: (a) the judiciary's status as a politically unaccountable branch; (b) its circumscribed competence to resolve broad questions of social policy; as well as (c) Congress' authority, conferred explicitly by the Fourteenth Amendment, to enact legislation enforcing the Equal Protection Clause. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 678-79 (1966) (Black, J., dissenting); *see also Missouri v. Jenkins*, 115 S. Ct. 2038, 2061 (1995) ("Unlike

Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license") (internal citations omitted).

B. There is no Justification for Re-Writing the Law Governing Congress' Enforcement Power

If established principles of constitutional law do not supply the basis for invalidating RFRA, Petitioner seems to argue, it is those principles -- rather than its challenge -- that should give way. In that spirit, Petitioner and its *amici* have proposed several ways in which the Court might depart from its prior decisions, in order to strike down RFRA: the Court might rule that the Section 5 power exists only to enforce Equal Protection principles and not those rights the Court has held protected by the Due Process guarantee (or, at least, not all of them), or, they suggest, the broad formulation of congressional power set out in *Katzenbach v. Morgan* might be disavowed.

These invitations to abandon precedent must be rejected. First, it is far from apparent that even re-writing the law in the manner suggested would yield the result sought. Limiting congressional power to Equal Protection concerns, for example, would by no means sound the death knell for RFRA, *see supra* (discussing Equal Protection rationales for RFRA). Moreover, no "special justification," *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), whatever has been identified for rolling back the Court's enforcement power case law, nor is any apparent. Finally, as is shown *infra*, there is no basis in constitutional text, structure, or original meaning for concluding that the case law is wrong.

1. Congress Has Authority to Enforce "Incorporated" Rights

Petitioner has suggested that this case might be distinguished from others in which Congress' power to enforce the guarantees of the Reconstruction Amendments have been upheld, because RFRA, unlike 42 U.S.C. § 1981, *see Runyon v. McCrary*, 427 U.S. 160 (1976), or 42 U.S.C.

§ 1973b, *see City of Rome*, was passed only to secure the right to free exercise of religion, a right that is secured by the Fourteenth Amendment only by its "incorporation" in the Due Process Clause, *see Cantwell v. Connecticut*, 310 U.S. 296 (1940), whereas those other statutes have involved the "core" power to address denials of Equal Protection. This suggestion suffers from two fatal defects: first, as has been shown above, RFRA plainly *was* enacted pursuant to Congress' power to enforce principles of Equal Protection, and second, a rule denying Congress the power to enforce "provisions" of the Fourteenth Amendment other than the Equal Protection Clause is not only incompatible with constitutional text and binding precedent but would make no sense in light of the history and purposes of the Fourteenth Amendment.

To be sure, it is a historical fact that the Fourteenth Amendment's framers were most concerned with securing the basic legal rights of African Americans -- and it is similarly undeniable that Congress' enforcement power is at its zenith when dealing with matters of racial discrimination, which are the concern of the Thirteenth and Fifteenth amendments, as well as the Fourteenth, *see Georgia v. Rachel*, 384 U.S. 780 (1966); *Carpenters v. Scott*, 463 U.S. 825, 835-37 (1983); *cf. Oregon v. Mitchell*, 400 U.S. at 128 (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments"). It does not follow, however, that Congress's power to enact "appropriate" legislation enforcing the Fourteenth Amendment is limited to situations in which principles of racial equality are threatened, *cf. id.* at 143-44 (Douglas, J.). On the contrary, any such limitation on congressional power is inconsistent with the text of the Fourteenth Amendment and would have been highly alien to the understanding of those who framed and ratified it.

The terms of Section 5 offer no basis on which to ground a distinction between the Equal Protection guarantee and the other rights secured by the Fourteenth Amendment's first section. Instead, the text provides, with no limitation or qualification, for congressional power to enforce "the *provisions* of this Article," through "appropriate" legislation. And *Hutto v. Finney*, 437 U.S. 678 (1978), *Maher v. Gagne*, 448 U.S. 122 (1980), and *United States v. Price*, 383 U.S. 787, 789 (1966), confirm what plain meaning would suggest: that there is "no doubt of the power of Congress to enforce . . . every right guaranteed by the Due Process Clause of the Fourteenth Amendment" (internal citation omitted).[8]

Nor is there any substantial reason, as a matter of political principle, why Congress' discretion to vitiate the threat posed by local majorities to unpopular beliefs or practices would be more restricted than its power to protect against threats to unpopular groups. On the contrary, and as the Court's cases teach, efforts to distinguish between threats to liberty and to equality often prove unstable. *See, e.g., Loving v. Virginia* 388 U.S. 1 (1967) (striking down anti-miscegenation law as denying Due Process right to marry and Equal Protection); *cf. West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute law on Free Speech grounds); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (holding that "[t]he right to equal

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[8]In *Oregon v. Mitchell*, a majority of the Justices held that Congress' power to enforce the right to travel, the precise textual source for which is no more certain than for "incorporated" rights, *see Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971), could supply the basis for supplanting State residency requirements for voting in federal elections (including those requirements which were not, in themselves, violative of the Fourteenth Amendment), *see* 400 U.S. at 147-50 (Douglas, J.); *id.* at 237 (Brennan, J, joined by White and Marshall, JJ.); *id.* at 285 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (gender discrimination).

protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments" to have been denied by refusing park permit to Jehovah's Witnesses, out of "dislike for or disagreement with the Witnesses or their views"); *see generally* HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

This interconnection between the Equal Protection guarantee and the liberties secured by the other clauses of the first section of the Fourteenth Amendment is by no means a modern discovery. Historical scholarship and the debates of the Reconstruction Congresses themselves show the Nineteenth Century Republicans responsible for drafting and securing the Amendment's ratification to have been acutely aware of the relationship between racial injustice and denials of civil liberties. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); DAVID A. RICHARDS, CONSCIENCE AND THE CONSTITUTION (1993). It had been out of solicitude for slavery, the Amendment's supporters repeatedly asserted, that the Framers of the Constitution had failed to make the Bill of Rights applicable to the States, *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (Rep. Bingham). Repeatedly, in the debates over the Amendment and other civil rights legislation, Republicans asserted that the compulsion to protect slavery from all incursions had led Southern States to interfere with rights of free speech, freedom of the press, and association, to permit mob justice, and to inflict cruel and unusual punishment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull). And these injustices were not believed to be a thing of the past: accounts of assaults on the basic rights of blacks and Republican sympathizers at the hands of unreconstructed rebels were being regularly received. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism*, 61 N.Y.U. L. REV. 863, 875 n.44 (1986). Whatever the precise intentions of the 39th Congress with regard to incorporating the guarantees of the original Bill of Rights against the States through the Fourteenth

Amendment, their dismay over these infringements of civil liberties by the States was undeniable.[9]

Indeed, the connection, as a matter of history, between concern for black freedom and for religious free exercise may have been closest of all.[10] Religion had

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[9]Although Petitioner does not suggest that the Court overrule *Cantwell* or the many other decisions applying the Bill of Rights to the States, the argument that the Section 5 power does not comprehend such rights has as its tacit premise a view of incorporated rights as a "poor relation" to more textually explicit Fourteenth Amendment guarantees. To the extent that it is relevant, recent historical scholarship has substantially fortified the position that the Framers *did* intend the Fourteenth Amendment to secure the Bill of Rights against the States. *See generally* CURTIS; *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1235 (1992).

[10]It has been argued, *see Amicus* Clarendon Foundation Br. at 25-26, that even if Congress has broad power to enforce incorporated rights, the "plain language" of the First Amendment somehow makes the Free Exercise right uniquely inappropriate for congressional action. To the extent that this argument stresses the phrase "Congress shall make no law," it is really an argument against *incorporation* of each of the clauses of the First Amendment, including the Free Speech Clause -- a position toward which the Court has shown no inclination of heading, *see, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (applying "First Amendment" standards to injunction issued by state judge).

To the extent that this argument depends on the original intent of the Framers of the First Amendment, it "gets the wrong history right," Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106, 1196 (1994). *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (Scalia, J., concurring) (relevant inquiry is understanding of Framers of the *Fourteenth* Amendment).

Nor is the "textual" argument overly careful about the constitutional text: although the First Amendment forbids Congress from enacting a law "respecting" the Establishment of Religion, implying a complete legislative disability on the subject, it denies Congress the

played a crucial role in the history of slavery as a political and constitutional issue. Many of the original Abolitionists had come to oppose slavery on religious grounds, and their antagonists in the Southern elite classes believed religiously motivated revolt to be the greatest threat to the institution of slavery, *see e.g.*, Lash, *Free Exercise* at 1133-34 (noting that Nat Turner, leader of the bloody 1831 uprising, had been a minister). This perception led to widespread adoption of repressive measures, including laws banning slaves' congregating together or learning to read, meant to prevent them from discerning from the Bible any hope of worldly liberation; and ultimately, to even more extreme measures, aimed at stopping the (Northern-influenced) religious word from spreading. *See id.* at 1133-37; *see also* RICHARDS at 125-34. These measures, in turn, escalated awareness among religious Northerners about the evil of slavery and deepened their conviction that the "peculiar institution" posed a threat to the constitutional order. Unsurprisingly, then, denials of the right of free exercise and "the rights of conscience" were staples of the Republican indictment of the South both before and after the war. *Cf. Blylew v. United States*, 80 U.S. 581, 597 (1872) (noting that 1866 Act was passed to prohibit "those state laws which forbade a free colored person from . .. . pass[ing] through the state, from having firearms, or from exercising the functions of a minister of the gospel").

2. *Katzenbach v. Morgan* Was Rightly Decided

Petitioner has further invited the Court to renounce "in part" *Katzenbach v. Morgan*, insofar as that decision acknowledged independent congressional power to identify situations in which Fourteenth Amendment principles are threatened. Once again, it is not clear that Petitioner would benefit from any redescription of the outer limits of the

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power only to "prohibit[] free exercise." Thus, while a law "enforcing" the Establishment Clause might arguably face difficulties, *see Morgan*, 383 U.S. at 654 n.10, a law "enforcing" the Free Exercise Clause encounters no similar First Amendment problem.

Fourteenth Amendment enforcement power. As is explained above, RFRA is fully sustainable as an exercise of Congress's "remedial" authority: the Act is addressed to situations where "violations" -- of the Free Exercise Clause, of Equal Protection, and of various "hybrid" rights -- surely do "lurk[]," *EEOC v. Wyoming*, 460 U.S. at 260 (Burger, C.J., dissenting). By lightening evidentiary burdens and supplying an "up front" guarantee of uniform treatment of religious claims, RFRA serves to root out and correct unconstitutional practices that would otherwise go undetected; and, by requiring government officials to consider effects on religion carefully before taking action (and to justify actions already taken), the Act prevents unconstitutional conduct from occurring in the first place.[11]

But even were RFRA's "remedial" credentials less impeccable, Petitioner has given no good reason for throwing over the 30-year-old *Katzenbach* decision (which commanded a 7-2 majority) -- let alone the "special justification" that principles of *stare decisis* demand. In fact, and as intervening opinions of this Court have affirmed, *Morgan* gave an account of Congress's power to enact "appropriate" legislation under the Reconstruction Amendments that is faithful to the text and structure of the Constitution and to the intentions of the Amendments' framers — and one that has played a constructive part in the development of modern civil rights law, as well, *see infra*.

In fine, Petitioner (implicitly) and *Amicus* (explicitly) ask this Court for more intensive judicial scrutiny of the

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[11]The characterization of *Morgan* as recognizing a "substantive" constitutional power in Congress has itself been justly criticized as a "red herring," *see* Robin-Vergeer, That decision no more recognizes a wide-ranging power in Congress to pronounce literacy requirements "unconstitutional" than *McCulloch v. Maryland* acknowledges a "substantive" power to charter corporations or *United States v. Darby*, 312 U.S. 100, 115-17 (1941) a congressional power to "interpret" the constitutional term "Commerce . . . among the several States."

relationship between congressional enactment and constitutional power under the Reconstruction Amendments than under Article I; the standard laid down in *McCulloch*, it is suggested, allows Congress too much discretion to determine the "appropriate[ness]" of measures for enforcing the Reconstruction guarantees. This argument runs up against formidable difficulties: to begin with, the text of the Constitution strongly suggests that the "Necessary and Proper" Clause applies -- not by analogy, but directly and by its own force -- to the powers conferred by the Reconstruction Amendments. *See* U.S. CONST. art. I, § 8, cl. 18 (Clause applies to "the foregoing powers and *all other* powers vested in the government of the United States"); *cf. United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1867) (No. 16,151) (Swayne, J.) (Necessary and Proper Clause confers power to enforce 13th Amendment).

But even were that not so, and even if the equation of review for "appropriate[ness]" standard with scrutiny under the Necessary and Proper Clause did not date back more than a century, *see Ex Parte Virginia*, the indictment of *Morgan* would ring hollow. At the very least, the suggestion that Congress enjoys less discretion in exercising its Fourteenth Amendment power than it does exercising powers conferred on it by Article I stands in tension with repeated statements, in a variety of settings, that congressional power was "enlarged" by the Reconstruction Amendments, *see, e.g., Bitzer*, 427 U.S. at 456; *EEOC v. Wyoming*, 460 U.S. at 240; *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and there can be little disagreement that the Framers of the original Constitution were more distrustful of congressional power than were the authors of the Fourteenth Amendment.

Nor, for that matter, is it immediately apparent how the interests of candor and political accountability that have been featured with increasing prominence in recent decisions, *see New York v. United States*, 508 U.S. at 156; *United States v. Lopez*, 115 S. Ct. 1624 (1995), would be

served by creating still greater incentives for Congress to cast antidiscrimination legislation as responsive to "substantial effects" on interstate commerce, *see Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding prohibition on discrimination in public accommodations, on the ground that restaurant purchased a significant fraction of its food from interstate vendors).[12]

These contentions become less convincing still when the legislative history of the Fourteenth Amendment is closely examined. The original draft of the Fourteenth Amendment consisted solely of a grant of legislative authority to Congress to enact

> all laws which shall be necessary and proper to secure the citizens of each State all privileges and immunities of citizens in the several States and to all persons in the Several States equal protection in the rights of life, liberty, and property.

see Cong. Globe, 39th Cong., 1st Sess. 1034 (1866), and although that proposal came to be replaced by a version, also drafted by Representative John Bingham, containing the explicit constraints on State power of Section 1 *and* the enlargement of congressional power of Section 5, the debt

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[12]Although this Court's opinions sometimes express the concern that a broad interpretation of Congress's "individual rights" power will supplant traditional state prerogatives in tort or criminal law, such dangers are scarcely absent under the Commerce power, *see, e.g., Cipolone v. Ligett Group, Inc.*, 505 U.S. 504 (1992) (holding certain state common-law causes of action preempted); *United States v. Lopez* (criminal law). Thus, while Petitioner thunders against the possibility that the Enforcement Power would sustain an "Ultimate Speech Act," Br. at 27 n.8, intended to facilitate nationwide distribution of hard-core pornography, a Congress bent on enacting such a law would have no trouble doing so on even the most restrained current understanding of the Commerce Clause. *See generally* Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 KAN. L. REV. 61 (1995).

to *McCulloch* remained plain. *See* 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . are constitutional."); *cf. The Civil Rights Cases*, 109 U.S. at 20 (§2 of 13th Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing the badges and incidents of slavery"); *id.* at 51 (Harlan, J., dissenting) ("[t]he word 'appropriate' was undoubtedly used with reference to its meaning, as established by repeated decisions of this court") (citing *McCulloch*).[13]

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[13]Petitioner's Amicus, the Clarendon Foundation, repeats the allegation that the original Bingham proposal was consigned to "the sleep that knows no waking," Br. for Amicus at 5 (quoting Cong. Globe, 42d Cong., 1 Sess. app. 115) (1871)), *i.e.*, that it was "rejected", Br. at 6-12, as conferring too much power on Congress. Although real concern was expressed about leaving protection of civil rights *solely* in the hands of future legislative majorities (which, presumably, would eventually include unreconstructed Southern Democrats), *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (Rep. Hotchkiss), the suggestion that the Amendment's final form marked a retreat for congressional power has been contradicted by modern scholarship, *see* Michael P. Zuckert, *Congressional Power under the Fourteenth Amendment: The Original Understanding of Section 5*, 3 CONST. COMM. 123, 129-34 (1986) (explaining that Bingham's proposal was never rejected on the merits and that "[t]he more plausible interpretation is that the Democrats did not see postponement as equivalent to rejection at all, but as just that -- the postponement, but continued life, of a piece of legislation they opposed"). *Cf.* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993)

As for the main thrust of the Clarendon Foundation Brief, depicting the *Morgan* power as the equivalent of the straw man attacked by Representative Bingham's opponents, *i.e.* congressional license to enact a "'code of municipal laws for the regulation of private rights,'" Br. at 16 (quoting *Civil Rights Cases*, 109 U.S. at 11), neither the statute upheld in *Morgan* nor RFRA, creates any "private rights." In fact, both create "modes of redress against the operation of state laws," Br. at 16. If RFRA sought to assure that no local landmark law would unduly burden religious free exercise by *enacting*

But as large as the *McCulloch* opinion loomed, this Court repeatedly has recognized an even more important influence on the 39th Congress's conception of enforcement power: Justice Story's opinion in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), upholding the constitutionality of the 1793 Fugitive Slave Act. *See. e.g., Patsy v. Florida Bd. Of Regents*, 457 U.S. 496, 504 (1983); *Monell v. New York City Dept. Of Social Services*, 436 U.S. 658, 672 (1978). As its abolitionist critics were keenly aware, *Prigg* took a very broad view of Congress's power to enforce the Constitution's Fugitive Slave Clause, *see* art. IV, § 2, cl. 3, even in the absence of an explicit grant of enforcement power, and upheld a private cause of action for damages against private defendants, in the face of a textual "state action" limitation, *see id.* ("No Person held to Service . . . in one State, under the Laws thereof, escaping into another, shall in *Consequence of any Law or Regulation* therein, be discharged from such Service") (emphasis supplied). Proponents of the Fourteenth Amendment cited *Prigg* as both the model and the measure of congressional enforcement power. *See* 41 U.S. at 612 ("If, indeed, the Constitution guarantees the right . . . the natural inference is that the national government is clothed with the appropriate authority and functions to enforce it"). Thus,

> Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the

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a national landmark law (rather than a law protecting religious freedom), *then* the danger warned against by Bingham's critics -- equality through uniformity and complete displacement of the States -- would have come to pass.

When the Clarendon Amicus Brief denies Congress the power to "proscribe[] . . . state actions that the federal judiciary has declared are fully consistent with the provisions of the Constitution," Br. at 21, Amicus has parted company not only with the author of the opinion of the Court in *Morgan*, but with the dissenter as well, *see Oregon v. Mitchell*, 400 U.S. at 215-17 (Harlan, J., concurring in part) (Congress may suspend literacy test nationwide).

> interest of slavery when it prevailed in a portion of the country.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull) (1866 Act); *accord Civil Rights Cases*, 109 U.S. at 53 (Harlan, J., dissenting); *see* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L. J. 565, 574 (1989); *see also id.* at 588 (explaining that certain enforcement provisions in 1866 Act were borrowed directly from 1850 Fugitive Slave Act).

The Framers of the Reconstruction Amendments, moreover, were especially hostile to the notion that delegated powers must be strictly construed -- a philosophy directly bound up in their minds with the legal theories of State Sovereignty which had emboldened the Southern Secessionists, *see* RICHARDS at 28-42. Their faith that the judiciary could be relied upon to give full effect to the protections of the Amendments was also short of complete.

There is still more direct evidence that the Framers took a broad, even a "substantive" view of their power under the Fourteenth Amendment. The same Congress that reported out the Fourteenth Amendment had enacted the 1866 Civil Rights Act (over a presidential veto), as an exercise of the "enforce[ment] by appropriate legislation" power conferred by Section 2 of the *Thirteenth* Amendment. If abolition of slavery and involuntary servitude could be "enforced" by requiring equal rights to make and enforce contracts, purchase property, or testify in court, it verges on inconceivable that the 39th Congress would have used identical "enforcement" language to express a narrow concept of congressional power under the Fourteenth Amendment. Although this exceptionally broad interpretation of the (13th Amendment) "enforcement" power was not free of all contemporaneous constitutional

doubt,[14] it was upheld in a series of federal court decisions and was enthusiastically embraced by the United States Executive Branch. *See generally Revolutionary Constitutionalism* at 900-22. Indeed, even the opinion for the majority in *The Slaughter-House Cases*, 83 U.S. 36 (1873), while taking a highly restrictive view of the list of "Privileges and Immunities" of National citizenship, took an expansive view of congressional enforcement power. To recognize a broad catalogue of National "Privileges," the Court explained, 83 U.S. at 77-78, would mean not only that

> these rights [would be] subject to control by Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the State in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects.

Indeed, the proposition that congressional power under the Thirteenth Amendment comprehends the (substantive) power not merely to prevent slavery but "rationally to determine" its "badges and incidents" and "to translate that determination into effective legislation" has not been a subject of controversy in modern era civil rights decisions. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 440; *see id.* at 449 (Harlan, J., dissenting) (arguing, as a matter of statutory interpretation, that Act does not reach private discrimination); *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981) ("'the Enabling Clause of that Amendment empowered Congress to do much more'" than "abolish[] slavery and establish[] universal freedom")(quoting *Jones*, 392 U.S. at 439); *Griffin v. Breckenridge*, 403 U.S. at 105; *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *cf. City of*

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[14]Representative Bingham was prominent in believing that the Thirteenth Amendment did not supply the power, but his has been shown likely to have been a minority view, *see Revolutionary Constitutionalism* at 910-11.

Rome, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting) (noting that powers under the Reconstruction Amendments "have always been treated as coextensive").

It has finally been suggested that the aspect of *Morgan* that is uniquely troubling is its recognition of a "ratchet," whereby Congress' alleged "substantive" powers of constitutional interpretation, *see supra*, allow it to expand upon, but not contract, those protections of the Fourteenth Amendment established by judicial decision. This allegation is misleading in at least four respects. First, Congress' complete lack of power to contract Equal Protection rights, *see Mississippi University for Women v. Hogan* 458 U.S. 718, 732 (1982), is a consequence not of *Morgan*, but of *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), and applies with no greater force when Congress acts under authority conferred by the Reconstruction Amendments than under any other source of power, *see, e.g., Metropolitan Life Ins. v. Ward,* 470 U.S. at 880-82 (1985) (congressional exemption of State laws from negative Commerce Clause scrutiny cannot immunize them against Equal Protection attack).

Second, as discussed above, the "ratchet's" "upward" dimension is itself the result of a semantic ploy, whereby Congress' election of appropriate means to enforce the Fourteenth Amendment is described as a choice of *ends* (thus an "interpretation" of the Constitution), while any other exercises of discretion are described in purely *instrumental* terms, *see, e.g., McCulloch*. But enacting an "appropriate" civil rights statute has no more of a "ratchet" effect than chartering a bank, and a rights statute no more "re-interprets" the Equal Protection guarantee than a law reaching in-state manufacturing "re-interprets" the meaning of "interstate commerce." At all events, the "ratchet" *does not operate* in one direction, as a matter of theory or fact: Congress always retains power to repeal the statute it enacted, thereby "contracting" rights in precisely the degree it once "expanded" them, and Congress has -- effectively unreviewable -- discretion not to wield its powers in the first

place (based on a "substantive" understanding of the Constitution -- or on no reason at all).

This last point is of special significance in this case, especially in deciding the proper weight to give *stare decisis* concerns. The long lull in decisions of this Court interpreting congressional authority under the Reconstruction Amendments was not the result of random chance but rather reflects a stark historical fact: that, for the better part of a century, Congress studiously neglected all responsibility for enforcing the basic rights guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments. This inaction was hardly reflective of a good-faith judgment that the States were, in fact, supplying "Equal Protection of the Laws," that the Right to Vote was not being abridged on account of Race or Color, or that the "badges and incidents" of the historic system of racial caste had been wiped away. It was attributable, rather, to "extraordinary defects in the national political proess," *South Carolina v. Baker*, 485 U.S. 505, 512 (1988), including, but not limited to the wholesale disenfranchisement of those whose rights were being most egregiously denied. This Court's response was boldly to move against racial injustice, in the name of constitutional principle, *see, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Cooper v. Aaron*, at considerable risk to the Court's power and prestige, *see also* JACK BASS, UNLIKELY HEROES (1981).

The decision in *Morgan* arose at a very different time, when the defects that had long plagued the national political process were beginning to be overcome, *see* ROBERT MANN, THE WALLS OF JERICHO (1996) (discussing passage of Civil Rights Act of 1964), and when Congress had taken up in earnest its responsibilities of enforcing the Constitution's civil rights protections. *See generally United States v. Price*, 383 U.S. at 806 (noting that, even 15 years earlier, "the federal role in the establishment and vindication of fundamental rights . . . was neither as pervasive nor as intense as it is today").

Morgan and other decisions upholding civil rights laws, *see, e.g., South Carolina v. Katzenbach,* recognized this to be a wholly salutary development: that Congress, as a politically accountable branch (and one not bound by *stare decisis*), as the one best suited for dealing with complex, interdependent claims, and most capable of framing broad remedial and prophylactic rules, was by far the better institution to consider assertions of new "rights" and to devise new and better modes for enforcing existing ones. This cooperative arrangement, explicit in certain decisions of the Court and implicit in others, is entirely "in accordance with [the] historical design," *Price*, 383 U.S. at 806, of the Reconstruction Amendments and has proved highly beneficial: the Court has been allowed to adhere to principles of judicial restraint, while Congress has developed substantial expertise in the problems of discrimination and civil rights remedies.

This understanding, that Congress may "lead" the Court, that it is authorized to make judgments that, while consistent with constitutional guarantees, are not strictly required by them, has been relied upon by both branches, *see Pennsylvania v. Union Gas*, 491 U.S. 1, 35 (1989) (Scalia, J, concurring in part and dissenting in part) (noting judicial and congressional reliance on 11th Amendment case law), and especially so with regard to legislation securing basic rights for individuals whose exclusion from full and equal participation in the mainstream has been most long and unjust. *See* Americans with Disabilities Act, 42 U.S.C. § 12101; Age Discrimination in Employment Act, 29 U.S.C. § 621; Voting Rights Act, 42 U.S.C. § 1973(b); Civil Rights Act of 1991, Pub. L. 102-166. Neither text, precedent, nor principle supports disturbing this settled understanding or casting doubt on the validity of such laws. *Cf. Bush v. Vera*, 116 S. Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring).

Conclusion

For the foregoing reasons, *Amicus* suggests that the judgment below should be affirmed.

Respectfully submitted,

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(23)

Supreme Court, U.S.
FILED
JAN 10 1993
OFFICE OF THE CLERK

IN THE

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OCTOBER TERM, 1996

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Petitioner,

v.

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BRIEF OF *AMICI CURIAE* SENATORS EDWARD M. KENNEDY, DANIEL K. AKAKA, TOM DASCHLE, CHRISTOPHER J. DODD, TOM HARKIN, JOHN F. KERRY, FRANK R. LAUTENBERG, CARL LEVIN, BARBARA A. MIKULSKI, AND JOHN D. ROCKEFELLER, AND REPRESENTATIVES CHARLES E. SCHUMER, JERROLD NADLER, THOMAS M. BARRETT, ROSCOE G. BARTLETT, HOWARD L. BERMAN, JOHN CONYERS, JR., WILLIAM D. DELAHUNT, RONALD V. DELLUMS, BOB FILNER, BARNEY FRANK, MARTIN FROST, LUIS V. GUTIERREZ, TONY P. HALL, JOHN LEWIS, NITA M. LOWEY, MARTIN T. MEEHAN, STEVEN SCHIFF, NORMAN SISISKY, FORTNEY PETE STARK, AND ROBERT WEXLER IN SUPPORT OF RESPONDENTS

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26 pp

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Pursuant to Rule 37, Senators Edward M. Kennedy, Daniel K. Akaka, Tom Daschle, Christopher J. Dodd, Tom Harkin, John F. Kerry, Frank R. Lautenberg, Carl Levin, Barbara A. Mikulski, and John D. Rockefeller, and Representatives Charles E. Schumer, Jerrold Nadler, Thomas M. Barrett, Roscoe G. Bartlett, Howard L. Berman, John Conyers, Jr., William D. Delahunt, Ronald V. Dellums, Bob Filner, Barney Frank, Martin Frost, Luis V. Gutierrez, Tony P. Hall, John Lewis, Nita M. Lowey, Martin T. Meehan, Steven Schiff, Norman Sisisky, Fortney Pete Stark, and Robert Wexler respectfully submit this brief as *amici curiae* to urge the Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit and uphold the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.[1]

INTEREST OF *AMICI CURIAE*

The *amici* are Members of Congress who are deeply interested in the continued vitality of the Religious Freedom Restoration Act, and many of whom participated in its enactment. As Senators and Representatives, moreover, *amici* have a profound interest in the scope of Congress' authority to enforce the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Congress enacted the Religious Freedom Restoration Act to protect religious freedom. Far from being unconstitutional, the Act is a permissible legislative effort to provide statutory protection for one of our most precious freedoms. Congress carefully considered the issue of religious liberty, and decided to provide additional statutory protections for this freedom above the constitutional floor. This congressional enactment is entirely consistent with the separation of powers; well within Congress' power under Section 5 of the Fourteenth Amendment; and appropriate under the Establishment Clause.

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[1] Counsel for both petitioner and respondents have consented to the participation of amici in this case, as evidenced in letters on file with the Court.

ARGUMENT

I. CONGRESS ENACTED THE RELIGIOUS FREEDOM RESTORATION ACT TO PROTECT RELIGIOUS FREEDOM

Congress enacted the Religious Freedom Restoration Act ("RFRA") to address substantial threats to the exercise of religious liberty. The legislation was adopted in 1993 with overwhelming bipartisan support—a 97-3 vote in the Senate, *see* 139 Cong. Rec. S14461, S14471 (daily ed. Oct. 27, 1993); unanimous consent in the House, 139 Cong. Rec. H8713 (daily ed. Nov. 3, 1993); and prompt signature by the President, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993). The legislation provides that government actions may not "substantially burden" the free exercise of religion unless the government has a "compelling governmental interest" and has used the "least restrictive means." 42 U.S.C. § 2000bb-1(b) (1994). The statute thus provides statutory protection for religious exercise beyond the constitutional minimum explicated by this Court in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

In the years following this Court's decision in *Smith*, Congress considered the state of religious liberty throughout the nation. Congress found a stark picture of harmful effects on religious minorities and potential governmental interference with the ability of groups and individuals to exercise their religious beliefs.

The Senate Judiciary Committee, for example, emphasized the testimony of Reverend Oliver S. Thomas. Appearing on behalf of both the Baptist Joint Committee on Public Affairs and the American Jewish Committee, Reverend Thomas testified about the harmful impact on religious exercise:

> Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction.

> Churches have been zoned out of even commercial areas. Jews have been subjected to autopsies in violation of their families' religious faith. * * * In time, every religion in America will suffer.

S. Rep. No. 103-111 at 7 (1993).

The congressional debates, moreover, contain extensive discussion of specific instances of threats to the exercise of religious liberty. Representative Hoyer, for example, noted that "Amish farmers have been forced to affix garish warning signs to their buggies, despite expert testimony that more modest silver reflector tape would be sufficient" and that a recent zoning case had prompted "a Minnesota trial judge to remark that churches have no more constitutional rights than adult movie theaters." 139 Cong. Rec. H2356, H2361 (daily ed. May 11, 1993). Representative Schumer similarly emphasized that "[t]he parade of horribles [has] already begun. In the 3 years since [*Smith*], evangelical store-front churches have been zoned out of commercial areas and Orthodox Jews and the H'mong people have been subjected to autopsies in violation of their religious faiths." 139 Cong. Rec. H2356, H2360 (daily ed. May 11, 1993). Representative Lowey reviewed instances in which "an individual could not display a cross on her own front lawn" and "individuals have been prevented from wearing yarmulkes, crosses, or rosaries." 139 Cong. Rec. H2356, H2362 (daily ed. May 11, 1993).[2]

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[2] *See also, e.g.*, 139 Cong. Rec. H2356, H2360 (daily ed. May 11, 1993) (Rep. Nadler) ("Our experience in the 3 years since *Smith* has demonstrated that religious minorities—and even majority religions—have been placed at a tremendous disadvantage."); 139 Cong. Rec. H2353 (daily ed. May 11, 1993) (Rep. Shepherd) ("[T]he religious rights of . . . groups like native Americans and Orthodox Jews continue to be sabotaged in the 3 years following the Supreme Court's decision. Without quick and decisive action, members of other faiths will face the same fate."); 139 Cong. Rec. E1243, E1244 (daily ed. May 12, 1993) (Rep. Franks) (RFRA addresses "the kind of Government discrimination which has resulted"); 139 Cong. Rec. H2356, H2357 (daily ed. May 11, 1993)

The Senate floor debate similarly included extensive discussion of threats to religious liberty. Emphasizing Reverend Thomas' testimony regarding the potential perils to religious observance, Senator Kennedy described "a climate in which the free exercise of religion is jeopardized" and explained that "a church denied the right to use wine in a communion service is just as adversely affected if the restriction is brought about by a general prohibition on alcohol consumption as by a specific law banning alcohol in religious services." 139 Cong. Rec. S14350, S14351 (daily ed. Oct. 26, 1993).

Senator Hatch likewise highlighted threats to religious freedom. 139 Cong. Rec. S14350, S14353 (daily ed. Oct. 26, 1993). Senator Hatch particularly stressed the experience of the Yangs, a Hmong family in Rhode Island whose son was subjected to an autopsy despite their "deeply held religious beliefs prohibiting the mutilation of the body through an autopsy." 139 Cong. Rec. S14350, 14353 (daily ed. Oct. 26, 1993). Although

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(Rep. Edwards) ("Autopsies have been unnecessarily and wrongly performed upon the Hmong and Jewish deceased in violation of strong religious feelings that autopsies should not be performed."); 139 Cong. Rec. H2356, H2363 (daily ed. May 11, 1993) (Rep. Maloney) ("The Jewish practices of kosher slaughter and circumcision, for example, might be threatened, as might the use of ceremonial wine, which is important to many faiths. Congregations of different religions have already run afoul of zoning regulations which have banned houses of worship in particular neighborhoods."); 139 Cong. Rec. H2356, H2357 (daily ed. May 11, 1993) (Rep. Fish) ("individuals seeking to practice their religion, unhampered by Government action, have largely been without recourse"); 139 Cong. Rec. E1234 (daily ed. May 12, 1993) (Rep. Cardin) ("Veterans have been denied the right to be buried in some veterans' cemeteries on Saturday and Sunday even if their religious beliefs required it; the Amish have been forced by state law to display fluorescent orange emblems on their horse-drawn carriages even though this violates their religious beliefs; autopsies have been performed on individuals whose religious beliefs prohibit autopsies even though the State was unable to show a compelling reason for performing the autopsy; and on and on.").

a district court initially had ruled in favor of the Yangs, the court recalled the decision and reversed course in light of *Smith*. As Senator Hatch recounted, Senior Judge Pettine nevertheless described his reaction to the plight of the Yangs, whose deep religious objections to autopsies had been brushed aside by the government:

> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of a large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief.

Id. (quoting *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990)); *see also* 139 Cong. Rec. S14515, 14516 (daily ed. Oct. 27, 1993) (Sen. Chafee) (describing the Yangs' experience and explaining that, "without congressional action . . . they and many, many others like them are and will remain helpless to prevent similar violations . . . Rhode Islanders and other Americans who are religious—be they Catholic, Moslem, Quaker, or Buddhist—may find themselves subject someday to apparently neutral government restrictions that nonetheless impair their ability to practice their religion").

Congressional hearings similarly presented extensive examples of particular threats to religious liberty posed by laws of general applicability. Mr. Yang, whose plight was described by Senator Hatch, testified about his ordeal in both the Senate and the House.[3] Witnesses submitted

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[3] *See The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 5-6, 14-28 (1992) ("Senate Hearings"); *Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 107-16 (1992) ("House Hearings").

to Congress detailed analyses of the effects of laws of general applicability on religious exercise.[4] These effects included both the difficulty of proving intentional discrimination against minority religions—a point specifically emphasized by the House Judiciary Committee, H. Rep. No. 88 at 5 (1993)—and the harmful impact of substantial burdens on religious exercise even in the absence of intentional discrimination. *See, e.g.*, House Hearings at 104-107. Witnesses describing threats to religious liberty included representatives from a wide range of religious groups, legal scholars, and representatives of civil liberties organizations.[5] Testimony from these hearings was repeatedly invoked during the legislative consideration of RFRA.[6]

In light of these threats, Senators and Representatives emphasized that RFRA was essential to preserve, protect, and enhance the fundamental constitutional right to religious liberty. As Senator Dole explained, RFRA "allow[s] people with sincere religious beliefs to act upon those beliefs . . . without having to run the gauntlet of unnecessarily large Government roadblocks." 139 Cong. Rec. S14465, S14466 (daily ed. Oct. 27, 1993). Numerous legislators stressed the importance of religious freedom in American society. As Representative Nadler emphasized, "[w]hat has made the American experiment work—what has saved us from the poisonous hatreds that are consuming other nations—has been a tolerance and a respect for diversity enshrined in the freedom of religion clauses of our Bill of Rights." 139 Cong. Rec. H2359 (daily ed. May 11, 1993). Senator Grassley similarly explained that "freedom of worship is one of the fundamental rights on which our nation was founded. . . .

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[4] *See, e.g.*, Senate Hearings at 50-58; House Hearings at 361-69.

[5] *See* Senate Hearings, *supra*; House Hearings, *supra*.

[6] *See, e.g.*, H. Rep. No. 88 at 2 n.2 (1993); S. Rep. No. 111 at 4 n.3, 7; 139 Cong. Rec. S2824 (daily ed. March 11, 1993) (Sen. Hatch); 139 Cong. Rec. H2356, H2361 (daily ed. May 11, 1993) (Rep. Orton).

It is important that we put the burden on Government to justify itself when it wishes to hinder the free exercise of religion." 139 Cong. Rec. S14469 (daily ed. Oct. 27, 1993).[7]

RFRA was enacted to prevent unnecessary and substantially burdensome government interference with the exercise of religious liberty. Congress discerned a pervasive and substantial threat to religious freedom, and enacted legislation to provide statutory protection for this fundamental constitutional right.

II. THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT VIOLATE THE SEPARATION OF POWERS

Congress' authority to provide statutory rights beyond constitutional requirements is well-established and perfectly consistent with the separation of powers. RFRA established a statutory right beyond the constitutional minimum elucidated by this Court in *Smith*. Far from violating the separation of powers, such a legislative decision

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[7] *See also, e.g.*, 139 Cong. Rec. S2822 (daily ed. March 11, 1993) (Sen. Kennedy) ("Few issues are more fundamental to our country. America was founded as a land of religious freedom and a haven from religious persecution."); 139 Cong. Rec. S14515, S14516 (daily ed. Oct. 27, 1993) (Sen. Chafee) ("Ensuring that each American has the right to exercise his or her religious beliefs goes straight to the heart of what this Nation is all about."); 139 Cong. Rec. H2356, H2360 (daily ed. May 11, 1993) (Rep. Goodlatte) ("we owe it to our heritage and to our children and grandchildren to protect these religious freedoms won at such great cost"); 139 Cong. Rec. S14461, S14469 (daily ed. Oct. 27, 1993) (Sen. Bradley) ("[o]ur nation's commitment to individual religious liberty is as old as our Nation itself—indeed, older. This long tradition of upholding the right to practice one's religion freely, without the unnecessary interference of Government, remains a core element of our national heritage" and "a bedrock in our societal framework"); 139 Cong. Rec. H2356, H2363 (daily ed. May 11, 1993) (Rep. Maloney) ("Freedom of religion is a fundamental right which transcends ideological, religious, and partisan differences.").

to provide statutory protection above a constitutional floor is an entirely appropriate exercise of legislative authority.

Congress' legislative authority to establish additional statutory protections beyond a constitutional floor is settled. For example, although this Court found that the Constitution prohibits only election practices undertaken with discriminatory intent, *Mobile v. Bolden*, 446 U.S. 55 (1980), it readily applied the Voting Rights Act of 1982, which nonetheless banned certain election practices with discriminatory effects. *Thornburg v. Gingles*, 478 U.S. 30 (1986). Similarly, although this Court held that the Constitution does not prohibit literacy tests as a prerequisite to the right to vote, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), it upheld Congress' subsequent prohibition on such literacy tests. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Gaston County v. United States*, 395 U.S. 285 (1969). The Court nowhere suggested that Congress' decision to provide statutory protections above the constitutional minimum somehow violated the separation of powers, or represented an attempt by Congress to "usurp" the role of this Court.

In the specific context of accommodating religious liberty, moreover, it is quite clear that legislative accommodation of religious practices beyond constitutional requirements does not represent an impermissible or inappropriate legislative role. *See, e.g., Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2492 (1994); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1970); *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 673 (1970). Indeed, in the *Smith* decision itself, this Court emphasized the legislative discretion to provide protection beyond the constitutional requirements articulated by the Court in *Smith*:

> Just as a society that believes in the negative protection accorded to the press by the First Amend-

> ment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Even while holding in *Smith* that the religious exercise at issue was not constitutionally protected, this Court observed that government may provide legislative accommodation for religious exercise through exceptions to generally applicable statutes. The Court held that legislative accommodation may be addressed in "the political process" and emphasized the differences between the judicial and legislative roles: "to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.* Rather than representing a separation of powers problem, legislative accommodation of religious observance embodies precisely the kind of permissible additional statutory protection that has been recognized and upheld.

Nor, contrary to petitioner's suggestion, does commentary on *Smith* during the legislative process somehow render RFRA a violation of the separation of powers. It is, of course, beyond dispute that Members of Congress are permitted to legislate in the context of considering the effect of Supreme Court decisions.[8] Congressional

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[8] *See, e.g., Thornburg v. Gingles*, 478 U.S. at 35 ("The amendment [to the Voting Rights Act] was *largely a response to this Court's plurality opinion* in *Mobile v. Bolden*, 446 U.S. 55 (1980), which had declared that, in order to establish a violation either of Sec. 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*, 412 U.S. 755 (1973).") (emphasis added).

debate and discussion concerning Supreme Court decisions and their effects are entirely appropriate, and raise no separation of powers problems.[9]

In addition, RFRA's legislative history makes explicit Congress' understanding that this Court's decision in *Smith* controls the constitutional interpretation, and that Congress' intent was to provide statutory protection above that constitutional floor.[10] Even if the legislative record were less explicit on this point, moreover, the pertinent inquiry is the function and effect of the statute. By funtion and effect, RFRA clearly provides statutory protection above and beyond the constitutional minimum.

In sum, therefore, RFRA represents a determination by the Legislative Branch to provide additional statutory protection for religious observances beyond the constitutional requirements set forth in *Smith*. This is not a violation of the separation of powers doctrine. It is the separation of powers doctrine at work.[11]

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[9] If legislation enacted in response to a Supreme Court decision were to *violate* the Constitution, of course, the legislation could not prevail. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990) (holding Flag Protection Act unconstitutional in light of *Texas v. Johnson*, 491 U.S. 397 (1989)).

[10] *See, e.g.*, S. Rep. No. 111 at 14 n.43 ("While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action. . . ."); H. Rep. No. 88 at 9 (in enacting RFRA, "Congress appropriately creates a statutory right within the perimeter of its power"); 139 Cong. Rec. H2356, H2358 (daily ed. May 11, 1993) (Rep. Hyde) ("the Congress writes laws—it does not and cannot overrule the Supreme Court's interpretation of the Constitution . . . . [RFRA] is a proposed federal statute and its meaning will be determined by its plain language and, to some extent, by the intent of Congress in enacting it.").

[11] Every Court of Appeals that has decided the issue, including the Fifth Circuit in this case, likewise has concluded that RFRA

III. RFRA IS WELL WITHIN CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5. RFRA is well within Congress' authority under this Amendment.

Legislation under Section 5 will be upheld if it is (i) "an enactment to enforce" the Fourteenth Amendment; (ii) is "plainly adapted to that end"; and (iii) does not violate any other constitutional limitations. *Katzenbach v. Morgan*, 384 U.S. at 651-52.[12] RFRA readily satisfies

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does not violate the separation of powers. *See Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (Posner, C.J.), *petition for cert. pending*, No. 96-710 (filed Oct. 29, 1996) ("Congress has not 'overruled' *Smith* or assumed a paramount authority of constitutional interpretation in derogation of the Supreme Court's authority under Article III. *Smith* remains undisturbed within its domain, that of the meaning of the First Amendment. The Religious Freedom Restoration Act does not alter that meaning. It creates a new statutory right designed to buttress the constitutional right."); *EEOC v. Catholic University of America*, 83 F.3d 455, 469 (D.C. Cir. 1996) (Buckley, J.) ("Congress's objective in enacting the statute was to overturn the *effects* of the *Smith* decision, not the decision itself. The Act does nothing more than substitute a statutory test for the constitutional test that *Smith* found not to be mandated by the Free Exercise Clause in cases where the right of free exercise was burdened by a neutral law of general application").

[12] The *Morgan* standard is derived from venerable precedents dating back to the era of the Civil War Amendments themselves. *See Ex parte Virginia*, 100 U.S. 339, 345-46 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880). It has been applied repeatedly by this Court. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 177 (1980) (applying test in Fifteenth Amendment context); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966) (Fifteenth Amendment).

this standard, and lies comfortably within bounds already recognized by this Court.

First, RFRA is "an enactment to enforce" the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. at 652. The Fourteenth Amendment applies the First Amendment's protection of religious liberty to the States. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). RFRA plainly is an enactment to protect the right of religious freedom embodied in the Fourteenth Amendment. The explicit statutory purpose is to "guarantee" the applicability of the compelling interest test "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb-(b)(1). The term "exercise of religion," in turn, is defined as "the exercise of religion under the First Amendment to the Constitution." *Id.* at § 2000bb-2(4). Moreover, as discussed (Section I, *supra*), the legislative record contains extensive discussion of the threats to religious liberty that RFRA was enacted to address. The purpose of RFRA clearly is to enforce the Fourteenth Amendment's guarantee of religious liberty.

Petitioner suggests that RFRA fails to satisfy this standard because it encompasses conduct that is not itself constitutionally protected under *Smith*. Pet. Br. at 30-31. This suggestion, however, reflects a fundamental misconception about the scope of Congress' authority under Section 5. This Court repeatedly has found that Congress' Section 5 authority "to enforce" constitutional guarantees is not confined to actions that violate the Constitution. *See, e.g., Thornburg v. Gingles*, 478 U.S. at 35 (applying prohibition on voting practices with a discriminatory effect, even though the Fourteenth and Fifteenth Amendments prohibit only intentional discrimination); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Congress "may prohibit practices that in and of themselves do not violate" the Constitution); *Morgan*, 384 U.S. at 648-49 (Congress may ban the use of literacy tests as voting requirements even though the Fourteenth and Fifteenth

Amendments do not prohibit the use of such tests). In order to ensure the protection and efficacy of constitutional rights, Section 5 gives Congress authority to enact statutory protections concerning actions that pose a substantial threat to constitutional rights even if the proscribed action itself has not been found unconstitutional.

Second, RFRA is "plainly adapted" to the goal of protecting the constitutional guarantee of religious liberty. *Morgan*, 384 U.S. at 648-50. RFRA requires government to accommodate religious practice, where possible and appropriate. *See* 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."). In response to the substantial threats to religious liberty posed by laws of general applicability, Congress crafted a statute to address this perceived danger to a fundamental constitutional right. Indeed, as discussed (page 9, *supra*), legislative accommodation is a familiar and accepted means of fostering religious freedom. *See, e.g., Smith*, 494 U.S. at 890; *Corporation of the Presiding Bishop v. Amos*, 483 U.S. at 334; *Walz v. Tax Comm'n of New York City*, 397 U.S. at 673. RFRA's legislative accommodation serves to combat substantial threats to religious freedom, including threats posed by government insensitivity to, or ignorance of, religious observance.[13] In short, RFRA was "plainly adapted" to the goal of protecting religious freedom.

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[13] *See generally Sasnett v. Sullivan*, 91 F.3d at 1021-22 ("It is not an accident that we have Sunday closing laws rather than Thursday closing laws. Religions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests—possibly even oblivious

Petitioner's principal objection to the "plainly adapted" conclusion again rests on the flawed premise that Congress has little, if any, authority to address conduct that might itself not be adjudicated a constitutional violation. Pet. Br. at 31-32. As discussed (pages 13-14, *supra*), this Court has held on numerous occasions that Congress has authority to adopt statutory protections that enforce constitutional rights beyond the four corners of actions already adjudicated to be unconstitutional. In adopting legislative accommodation to religious observances, Congress was employing an established and appropriate means of enforcing the right to religious liberty. As this Court has recognized, laws of general applicability may burden the exercise of religious liberty. *See, e.g., Smith*, 494 U.S. at 890. Section 5 gives Congress the authority to remove substantial burdens on this constitutional right, even if the burden itself would not be found unconstitutional.[14]

Third, RFRA is "consist[ent] with the letter and spirit of the constitution." *Katzenbach*, 384 U.S. at 650. RFRA protects a fundamental freedom, applicable to the States through the Fourteenth Amendment. Contrary to petitioner's suggestion, requiring accommodation of the exercise of religious liberty does not violate "principles of federalism" and the Tenth Amendment.

At the outset, it is important to clarify that Congress' Section 5 enforcement authority must be analyzed in the

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to their existence. The formal right of the members of these sects to the free exercise of their religion may have little practical value if observance is made onerous by general-purpose legislation.").

[14] Petitioner suggests that any "prophylactic" legislation under Section 5 must be accompanied by detailed factual findings, and that RFRA fails this standard. Petitioner's contention is erroneous. First, factual findings are not required to support congressional legislation. *See, e.g., United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995). Second, as discussed (Section I, *supra*), the legislative record of RFRA is replete with discussion of the threats to religious freedom that RFRA is intended to address.

context of the Civil Rights Amendments, whose very purpose was to guarantee protection and enforcement of constitutional rights in the States. In the very first case interpreting Section 5 of the Fourteenth Amendment, this Court determined that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. at 345. Accordingly, enforcement of the provisions of the Amendments by Congress "is no invasion of State sovereignty." *Id.* at 346.[15] In short, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden" by Congress' broad power to enforce the Civil War Amendments." *City of Rome v. United States*, 446 U.S. at 179.[16]

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[15] *See also Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1125 (1996) (the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution"); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Civil War Amendments "worked a dramatic change in the balance between congressional and state power"); *Fitzpatrick v. Bitzer*, 427 U.S. at 456 ("When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authortiy under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.").

[16] Petitioner's reliance on cases unrelated to the Fourteenth Amendment, such as *United States v. Lopez*, 115 S. Ct. 1624 (1995) and *New York v. United States*, 505 U.S. 144 (1992), thus is inapposite. Petitioner's reliance on *Oregon v. Mitchell*, 400 U.S. 112 (1970) also is misplaced because Congress' effort to lower the voting age in state elections conflicted with Article 1,

Particularly when viewed in this context, RFRA plainly does not violate principles of federalism. Religious liberty is a fundamental freedom, made applicable to the States by the Fourteenth Amendment and enforceable in the States by Congress under Section 5. The purpose of the legislation—the protection of religious liberty—is squarely within the mission of the Fourteenth Amendment. RFRA, moreover, does not direct or compel any particular state legislation on any particular subject. Even with regard to state actions that burden religious observance, the statute does not prohibit such enactments: it applies only to enactments that "*substantially*" burden religious observance, and prohibits only substantial burdens that are not justified by a "compelling governmental interest" and "the least restrictive means." 42 U.S.C. § 2000bb-1(b) (emphasis added). RFRA's accommodation of religious liberty appropriately ensures the protection of constitutional rights, and does not violate principles of federalism and the Tenth Amendment.

Petitioner's suggestion that this Court should overrule or sharply restrict *Katzenbach v. Morgan* should be rejected. As this Court repeatedly has recognized, Section 5 grants Congress broad legislative discretion in enforcing the constitutional guarantees of the Civil Rights Amend-

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§ 2. *See, e.g., id.* at 125-26; *see also id.* at 117-19 (upholding other congressional enactments). To the extent that petitioner suggests that constitutional rights incorporated by the Fourteenth Amendment, such as religious freedom, should be accorded a different standard than other constitutional rights, petitioner's contention would create an unprecedented and inappropriate hierarchy of rights within the Fourteenth Amendment. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 693-95 (1978). In any event, RFRA also enforces equal protection rights under the Fourteenth Amendment. *See e.g.*, S. Rep. No. 111 at 8; House Hearings at 326 (statement of Douglas Laycock); 139 Cong. Rec. E1243 (daily ed. May 11, 1993) (Rep. Franks) (discussing "especially burdensome" implications "for those whose beliefs lie within the religious minority."); *Flores* v. *City of Boerne*, 73 F.3d 1352, 1360 (5th Cir. 1996).

ments.[17] As this Court observed more than three decades ago, "[a] construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Morgan*, 384 U.S. at 648. Restricting Congress' authority to the boundaries of conduct that itself would be adjudicated unconstitutional—and denying Congress the ability to craft statutory protections and enforcement mechanisms that alleviate substantial burdens on Fourteenth Amendment rights—"would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Id.* at 648-49. A proper understanding of the Fourteenth Amendment's mission of ensuring the enforcement of constitutional rights—and of Section 5's role within the Fourteenth Amendment—precludes such a truncated view of Congress' authority and discretion.

In enacting RFRA, Congress acted to enforce and protect the Fourteenth Amendment's guarantee of religious liberty. The statute was well within Congress' authority under Section 5 of the Fourteenth Amendment.

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[17] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. at 490 (opinion of O'Connor, J.) ("The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."); *Maher v. Gagne*, 448 U.S. 122, 132 (1980); *Strauder v. West Virginia*, 100 U.S. at 312.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

RFRA's protection of religious liberty comports with the Establishment Clause. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 334 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987) (footnote omitted)). It is well-established, moreover, that "the limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334. Congress' determination that, before imposing a "substantial burden" on religious observance, the government must have a compelling interest and apply the least restrictive means represents "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of New York*, 397 U.S. at 669.

Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), an Establishment Clause challenge to legislation requires that the legislation be subjected to a three-part inquiry: (1) whether its purpose is permissible; (2) whether its effect is to advance or inhibit religion; and (3) whether its administration will foster excessive government entanglement with religion. RFRA readily satisfies this standard, and raises no Establishment Clause problem.[18]

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[18] Individual Justices have advocated alternative Establishment Clause standards. *See, e.g., Grumet*, 114 S. Ct. at 2495-2500 (O'Connor, J., concurring in part and concurring in the judgment); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring in the judgment). For the reasons explained in the text, RFRA also satisfies the Establishment Clause under any of the alternative standards that have been proposed.

With regard to the legislative purpose, RFRA is designed to accommodate religious observance. Such accommodation unquestionably is a permissible legislative goal and is not invalid under the Establishment Clause. *See, e.g., Amos*, 483 U.S. at 335 ("it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). Indeed, as noted (page 10, *supra*), this Court in *Smith* specifically found that accommodation may be addressed in "the political process." *Smith*, 494 U.S. at 890.

With regard to RFRA's *effect*, the Act does not itself impose the type of benefits or burdens that have traditionally raised constitutional concerns. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Rather, as a general statute, the only benefit the Act confers is that government will not lightly burden religious practice. This type of accommodation merely permits religious exercise without interference, the type of "benevolent neutrality" previously approved by this Court. *Walz*, 397 U.S. at 669. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' . . . it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.[19]

Finally, RFRA also does not result in excessive government entanglement in religious practices. To the contrary, the Act imposes additional limitations on governmental interference with religion. Certainly the Act does not create any type of program "whose very nature is apt to entangle the state in details of administration." *Lemon v. Kurtzman*, 403 U.S. at 615 (citation omitted); *see*

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[19] In addition, by treating all religions equally, RFRA does not implicate Establishment Clause concerns raised by favoring one sect over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see Smith*, 494 U.S. at 886 n.3.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). RFRA furthers the principle of separation of church and state by ensuring that government will not unnecessarily impose substantial burdens on religious exercise. Thus, just as in *Amos*, "[i]t cannot be seriously contended that [the Act] impermissibly entangles church and state; the statute effectuates a more complete separation of the two." *Amos*, 483 U.S. at 339.[20]

RFRA's purposes, effects, and required governmental role are entirely consistent with the command of the Establishment Clause.

---

[20] The Act explicitly states "Establishment Clause Unaffected—Nothing in this chapter shall be construed to affect, interpret or in any way address [the Establishment Clause]. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause shall not constitute a violation of this chapter." 42 U.S.C. § 2000bb-4. As the Fifth Circuit duly noted, the Act itself therefore "provides that the accommodations mandated by RFRA may reach up to the limit permitted by the Establishment Clause but no further." *Flores*, 73 F.3d at 1364.

CONCLUSION

The Religious Freedom Restoration Act protects the fundamental freedom of religious liberty. It is a legislative accommodation of religious observance that goes beyond the minimum constitutional requirements delineated by this Court in *Smith*. Such an enactment is an appropriate legislative function under the separation of powers; is within Congress' authority to enforce constitutional rights under Section 5; and fully comports with the Establishment Clause. Accordingly, this Court should uphold the constitutionality of the Religious Freedom Restoration Act and affirm the judgment of the Court of Appeals.

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January 10, 1997

No. 95-2074

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

—versus—

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

—and—

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF MEMBERS OF THE VIRGINIA HOUSE OF DELEGATES AND THE VIRGINIA SENATE IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF MEMBERS OF THE VIRGINIA HOUSE OF DELEGATES AND THE VIRGINIA SENATE IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici Curiae are twenty-three members of the Virginia House of Delegates and seven members of the Virginia Senate. Members of the Virginia House of Delegates are Kenneth R. Plum, Harvey B. Morgan, Harry J. Parrish, Mitchell Van Yahres, Marian Van Landingham, James M. Scott, W. Tayloe Murphy, R. Steven Landes, Julia

A. Connally, L. Karen Darner, Glenn M. Weatherholtz, George H. Heilig, Jr., Franklin P. Hall, James F. Almand, Linda T. Puller, John H. Tate, Jr., Vincent F. Callahan, Jr., James H. Dillard II, Leo C. Wardrup, Alan A. Diamonstein, Frank M. Ruff, Eric I. Cantor, Thomas M. Jackson, Jr., and John J. "Butch" Davies. Members of the Virginia Senate are W. Roscoe Reynolds, R. Edward Houck, Patricia S. Ticer, Emmett W. Hanger, Jr., Joseph V. Gartlan, Jr., Janet D. Howell, and Frederick M. Quayle.

The Commonwealth of Virginia has long been committed to ensuring religious freedom of its citizens. Since the founding of the Republic, Virginia's commitment to and experiment in freedom of religious exercise has played an important role in this nation's commitment to religious freedom. In his *Notes on the State of Virginia*, Thomas Jefferson wrote of the beneficial effects on the republic created by the flourishing of numerous creeds:

> Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites.

Thomas Jefferson, *Notes on the State of Virginia, in The Portable Thomas Jefferson* 212 (Merrill D. Peterson ed., 1975). In furtherance of its commitment to religious freedom, the General Assembly of Virginia was among the first in the Union to enact in 1786 "A Bill for Establishing

Religious Freedom." *See The Portable Thomas Jefferson, supra,* at 251-253.

As legislators of the Commonwealth of Virginia, *amici curiae* are committed to upholding Virginia's commitment to religious free exercise and at the same time are vitally concerned with preserving state legislative prerogative to enact laws of general applicability without undue interference from Congress or the judiciary. Determination by the Court of the issues presented in this case -- especially whether Congress, in enacting the Religious Freedom Restoration Act of 1993 ("RFRA or the "Act"), acted within its constitutional and legislative power in creating a right of action for courts to review state legislative enactments based on claims that such enactments substantially burden religious free exercise -- thus involves balancing of interests that are of great importance to *amici*.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act of 1993 ("RFRA" or the "Act") achieves the aim of preserving freedom of religious exercise without unduly constraining state legislative processes. Indeed, RFRA vitally supports state legislatures in enacting statutes of general applicability by ensuring that such statutes will be reviewed by those institutions -- courts -- that are best suited to craft exemptions to such laws where necessary to further legitimate religious exercise.

State legislatures are ill-equipped and incapable of prospectively crafting exemptions to generally applicable statutes that take account of all religious practices that inadvertently may be unduly restricted. Although subsequent legislative amendment of general laws is possible, claims that generally applicable statutes may substantially burden

religious freedom are best reviewed by courts rather than by legislatures. Such claims require determination of the sincerity of religious beliefs, which often involves credibility determinations uniquely well suited for the judicial task; exemptions to general laws based on religious practice are better and more efficiently crafted in the context of case-by-case adjudications based on developed factual records, which is the essence of the judicial function; and courts, through their adherence to historical precedent, are uniquely well situated to mitigate in a principled fashion against the unforeseen and unintended harsh consequences of laws which must be written in general terms.

Thus far from infringing on state legislative processes or the prerogatives of state legislators, *amici* believe that RFRA supports them. RFRA enables *amici* to do their jobs of legislating generally without undertaking the ill-conceived and futile task of attempting prospectively to evaluate the effect of general laws on every known religious practice or to make the kinds of credibility determinations concerning the sincerity of religious belief that courts are best equipped to make. By creating a right of judicial review, RFRA helps ensure that legislative enactments will not result in unintended and unremedied burdens on religious exercise, and places the responsibility for crafting necessary exemptions to accommodate free exercise claims on courts, which are institutionally better situated than legislatures in performing this function.

ARGUMENT

RFRA SUPPORTS STATE LEGISLATORS AND ENHANCES STATE LEGISLATIVE PROCESSES BY ENSURING THE ROLE OF JUDICIAL INSTITUTIONS IN CRAFTING NECESSARY EXEMPTIONS TO STATUTES OF GENERAL APPLICABILITY TO PROTECT RELIGIOUS FREEDOM

The Religious Freedom Restoration Act of 1993 creates a private right of action "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). The Act expressly "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). As such, RFRA provides an avenue for judicial review of state and federal statutes, including those of general applicability, that may substantially burden religious exercise even if they do not run afoul of the First Amendment.

The right of action created by RFRA is necessary to protect the fundamental value of religious free exercise. The nature of the legislative process is such that in drafting and enacting laws, legislatures must inevitably paint with a broad brush. "The limitations on [the legislature's] ability to foresee or consider particular problems that may in the future arise under a statutory scheme often require that legislation be drafted by reference to general categories rather than to specific classes of activities within those categories." *Natural Resources Defense Council, Inc. v. U.S. EPA*, 725 F.2d 761, 770 (D.C. Cir. 1984).

Such generally written laws, although achieving the purpose of reaching broad variations in conduct, often have the accompanying and unforeseen consequence of also

reaching conduct not intended to be covered by the enactment. This is because the nature of legislation is prospective, and lawmakers cannot *a priori* anticipate and consider all possible consequences of their enactments and specify necessary exemptions. As Judge Learned Hand remarked over a half-century ago: "[E]ven if the law had language of its own, it could not provide for all situations which might come up. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe the proper rule for each." Learned Hand, How Far Is A Judge Free In Rendering A Decision? *in The Spirit of Liberty: Papers and Addresses of Learned Hand* 105 (Irving Dilliard ed., 1974).

The hazards of legislating with general and potentially overbroad strokes are particularly acute when such general laws burden fundamental values such as freedom of religious exercise. Congress recognized as much when it enacted RFRA. Throughout the legislative debates surrounding enactment of RFRA are numerous references to unacceptable burdens on religious free exercise imposed by laws of general applicability. *E.g.*, 139 Cong. Rec. S14353 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (criticizing neutral Minnesota state law that allowed removal of children from parents' homes due to parents' religiously motivated actions and Michigan state officials' performance of autopsy despite father's religious objections).

In order to mitigate harsh and unintended-for consequences of broad language, the need thus arises for exemptions to be formulated as general legislation is applied in particular cases or circumstances. This Court recognized this abiding truth over a century ago:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to

> injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. . . . The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit."

Holy Trinity Church v. United States, 143 U.S. 457, 461 (1892) (quoting *United States v. Kirby*, 74 U.S. 482, 486-487 (1868)); *see also e.g., Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980) ("The doctrine of fair use [in copyright law], originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

Although subsequent legislative amendments could result in statutorily enacted exemptions designed to mitigate the unforeseen and harsh consequences of generally applicable laws, judicial institutions are better equipped to engage in this task of crafting exemptions for several independent reasons.

First, the process of exempting particular conduct from generally applicable laws is better done through case-by-case adjudication in which a factual record is developed. "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular

discussions and adjudications." James Madison, Federalist No. 37, *in The Federalist Papers* 229 (Clinton Rossiter ed., 1961).

Reasoning has a role to play in the development and evolution of the law, "[b]ut as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent." Benjamin N. Cardozo, *The Nature of the Judicial Process* 35 (1921). *See also e.g., Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980) ("The cases emphasize that resolution of a fair use claim 'depends on an examination of the facts in each case [and] cannot be determined by resort to any arbitrary rules or fixed criteria.'" (citation omitted)).

Because the task for case-by-case adjudication is one for the courts, those institutions are better equipped than are legislatures in formulating exemptions to general statutes.

Second, courts rather than legislatures are uniquely well situated to make the kind of credibility determinations that are often involved in determining whether exemptions to general laws should be formulated. This is particularly true in the context of religious free exercise claims. Such claims inherently involve consideration of the sincerity of religious belief, and the importance of such belief to one's practice of religion.

In a recent case in the Commonwealth of Virginia involving claims under RFRA, for example, the district court granted preliminary relief in favor of plaintiffs who argued that application to their Meal Ministry of a section of the Richmond City Ordinance, which limited the frequency and volume of the provision of services to the homeless, violated their rights to free exercise as protected by the First

Amendment and RFRA. *See Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia*, __ F. Supp. __, 1996 WL 685755 (E.D. Va. Nov. 26, 1996). The court based its holding in part on its conclusion that "[p]laintiffs have made a strong showing that feeding the poor constitutes a central tenet of the religion practiced at the six churches involved in the Meal Ministry." *Id.* at *11.

Such credibility determinations concerning the sincerity of religious belief form the basis of religious free exercise claims. Because courts regularly engage in such determinations of credibility and are institutionally better suited to make such determinations within a particular factual context, providing a right to obtain judicial review promotes the process of formulating well-crafted exemptions to general legislation.

Third, courts, through their adherence and commitment to observing historical precedent, are uniquely well situated to mitigate in a principled fashion against the unforeseen and unintended harsh consequences of laws which must be written in general terms. As Judge Learned Hand observed, tolerance for minority faiths in this country is best preserved and enhanced through mindfulness of the lessons of humility and evanescence contained in the historical record. Through knowledge and application of the lessons of history, "the political life of a country like ours would get depth and steadiness, would tend to escape its greatest danger, which is the disposition to take the immediate for the eternal, to press the advantage of present numbers to the full, to ignore dissenters and regard them as heretics, by some adumbration of what men have thought and felt in other times and at other places." Learned Hand, Sources of Tolerance, *in The Spirit of Liberty: Papers and Addresses of Learned Hand* 80 (Irving Dilliard ed., 1974).

Courts, when crafting exemptions to general laws, are mindful of history and are trained to proceed in a principled fashion. "[R]estrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe [a judge's] action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law." Benjamin N. Cardozo, *The Nature of the Judicial Process* 114 (1921).

Rather than reacting to well-organized minority religions, courts may thus be better able to resist political pressure in determining whether exemptions to general laws are warranted. *See generally* H.R. Rep. No. 88, 103d Cong., 1st Sess. at 6 (1993) ("It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute."); S. Rep. No. 111, 103d Cong., 1st Sess. at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892 ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right.").

By creating a right of action against legislative enactments, RFRA thus promotes rather than constrains state legislative processes. RFRA achieves this result by helping to ensure that legislative enactments will not result in unintended and unremedied burdens on religious exercise, and by placing the responsibility for crafting necessary exemptions to accommodate free exercise claims on courts, which are institutionally better situated than legislatures in performing this function.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully urge the Court to affirm the decision of the Court of Appeals for the Fifth Circuit upholding the Religious Freedom Restoration Act.

Dated: New York, New York
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Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 95-2074

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Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF PRISON FELLOWSHIP MINISTRIES AND THE ALEPH INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the enactment of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, was a proper exercise of constitutional authority under Section 5 of the Fourteenth Amendment by Congress and the President of the United States.

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INTEREST OF AMICI CURIAE

Amici Prison Fellowship Ministries ("PFM") and The Aleph Institute ("Aleph") submit this brief in support of Respondent to urge the Court to affirm the decision below and uphold the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb ("RFRA") as constitutional. *Amici,* having a direct interest in how religion is treated in state and federal prisons, ask the Court to consider that RFRA now enables the proper accommodation of free exercise of religion, as a fundamental right retained by prisoners, and helps advance important penological objectives, including the reduction of recidivism.

Prison Fellowship Ministries. PFM is a tax exempt, charitable and religious organization founded in 1976 by Charles W. Colson to assist the church in its ministry to prisoners, ex-prisoners, crime victims and their families. Coordinating its ministry through 54 area offices and the service of more than 50,000 volunteers, PFM provided more than 3,000 in-prison programs in 1996 to more than 250,000 inmates nationwide. It publishes many resources, including *Inside Journal*, a newspaper serving a third of the nation's prison population, Bible studies for individuals and groups, and seminar materials for prisoners and their spouses. It sponsors an annual Christmas Angel Tree gift program that has reached more than 2.5 million children of inmates since 1982. Its work is now effectively extended through affiliates Justice Fellowship (27 state task forces on criminal justice policy and reform), Neighbors Who Care (chapters in eight states sponsoring local crime victims assistance programs), and Prison Fellowship International (organizations in 76 nations working for just and effective criminal justice systems in each country).

The Aleph Institute. Hailed by the Rev. Charles Riggs, former Chief Chaplaincy Administrator for the Federal Bureau of Prisons, as "the most significant rehabilitative program for Jewish prisoners in the history of the U.S. prison system," Aleph is a not-for-profit, national Jewish

educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish inmates and their families maintain essential connections to each other and to their spiritual heritage, providing educational materials to children of Jewish inmates, counseling to spouses, parents and children, and financial assistance to families in need.

Aleph is in the forefront of defending Jewish inmates' religious freedom, their rights to possess essential religious articles, books and clothing, and to properly observe the mandated tenets of their religion. Aleph also provides resources for Jewish inmates who would otherwise be unable to observe daily and holy days ritual requirements. It provides thousands of candles, prayer books, and grape juice to enable Jewish inmates to welcome Sabbath properly at those institutions that will let them. It provides menorahs and candles at Chanukah through its "Lights Across America" program. It distributes thousands of pounds of matzo, grape juice and kosher-for-Passover foods for at least the two Passover Seder ritual celebration meals. It provides rabbinical visits to give educational materials, counseling and spiritual support to the more than 6,000 Jewish immates at all federal, state and county prisons.

Prison officials and chaplains across the country are regularly informed through the *Aleph Advisory* newsletter about all mandated Jewish holy days, with explanations of the ritual items needed, and their availability without cost.[1] Aleph is also now publishing the *Institutional*

[1] In a system in which Jewish inmates represent a minute percentage of the general population—and are often surrounded by hostile forces—non-Jewish prison chaplains and administrators often lack the personnel, specialized knowledge, or resources necessary to meet the spiritual needs of Jewish inmates. Many are unfamiliar with menorahs, Chanukah candles, matzo, kosher-for-Passover foods and daily ritual practices, including prayer shawls, Tefillin (phylacteries), kosher diet and facial hair restrictions. Aleph exists to help meet such needs.

Handbook of Jewish Practice and Procedure for use by prison officials throughout the country.

The Importance of RFRA to Inmates. *Amici* strongly maintain that RFRA's broad protection is necessary and essential for *all* inmates, of whatever religious faith, to properly observe their own religious traditions, subject to bona fide necessities of prison discipline, security, safety and order. Under RFRA, never again should any inmate suffer an official but capricious excuse, denying a proper request to accommodate religious observance; indeed, this is what *Amici* fear would recur without RFRA.

The Solicitor General of the United States' letter of consent to the filing of this brief is filed herewith pursuant to Rule 37.3. The remaining parties have filed general consents with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress' enactment of RFRA was a monumental accomplishment, called "among the most significant civil rights legislation in our history."[2] Nevertheless, RFRA has detractors who belittle the problems it seeks to remedy. *Amici* PFM and Aleph respond to Petitioner's subtle suggestion that RFRA's effect on such matters as "prison oversight" has been pernicious.[3] *Amici* in support of Petitioner go so far as to offer a "parade of horribles" relating to RFRA.[4] However, not only is there no case or controversy regarding RFRA's applicability to prison administration, the suggestion invites the wrong result. Contrary to Petitioner's misreading of *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress acted

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[2] *See* 140 CONG. REC. H11193-05, S11195 (daily ed. Oct. 6, 1994) (statement of Cong. Waxman). Passed by overwhelming bipartisan majorities in Congress (House of Representatives, unanimously by voice vote; Senate, 97-3), RFRA was signed into law by President Clinton on November 16, 1993.

[3] *See* Brief of Petitioner City of Boerne, Texas (hereinafter "Pet. Br.") at 21.

[4] *See* Brief of Amici States of Ohio, *et al.* in Support of Petitioner (hereinafter "Amici States Br.") at 2-8.

properly under section 5 of the Fourteenth Amendment in considering how best to protect religious liberty when government substantially burdens its exercise. In doing so, it reached no novel result concerning treatment traditionally accorded religious liberty in this country.[5] As this Court recognized in *Smith*, "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." *Id.* at 890. Just as anticipated, RFRA was the result of such a political process: "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

Prisoners' fundamental and constitutional right to the free exercise of religion, *i.e.*, to engage in acts only for religious reasons, is generally conducive to penological objectives. Congress sacrificed no essential governmental interests in prison security and order when determining that non-compelling governmental interests must yield to prisoners' religious accommodation claims. For inmates, particularly minority religious adherents, RFRA is a critical means of redressing egregious problems previously beyond practical judicial resolution, whether due to the time it takes to exhaust administrative remedies while religious holidays and observances are being missed, mootness resulting from arbitrary transfers, or other causes.[6]

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[5] M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[6] *See infra* note 24 and accompanying text. These problems included prison officials' prohibiting acts engaged in only for religious reasons—such as denying an Episcopalian inmate access to sacramental wine at communion outside prison and barring practicing Jewish inmates from wearing beards or yarmulkes, eating kosher food, conducting a Passover Seder, or lighting Chanukah candles. Jewish inmates have been prohibited from congregating for prayer, despite Muslim co-inmates being accorded such privileges as a result of having filed suit. *See, e.g.*, State of Florida Department of Corrections ("FL DOC"), Inmate Request form for Gary Parker (Feb. 20, 1996) (copy on file with *amicus* Aleph Institute).

Such problems, implicating this fundamental right, called for a legislative response consistent with this Court's invitation in *Smith* for political branches of government to provide the means of exemptions. Petitioner misunderstands *Smith* to say that if religious exemptions are not constitutionally required, then Congress may not even permit them as a matter of legislative grace. This stands the Court's reasoning on its head. Congress, exercising its express powers under Section 5 of the Fourteenth Amendment, responded to protect fundamental free exercise rights that it determined were being violated. The subject rights are textually located in the First Amendment and incorporated into the Fourteenth Amendment by this Court as a matter of well-established legal doctrine. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Federal Bureau of Prisons, and many States, have established guidelines for prisons that work well with RFRA. *Amici* submit that the preparation of appropriate guidelines for responding to requests for religious accommodation will ease concerns for administering the diversity of requests that are being made.[7] That inmates represent different faith groups need not be a problem for state officials. Facilitating religious exercise among inmates will help to improve morale and relationships with others,

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[7] Several States have put in place guidelines that successfully implement RFRA. *See, e.g.*, STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, *Handbook of Religious Beliefs and Practices*, (1987, Rev. 1995) (which *amici* understand is serving as unofficial guidelines for prison officials in approximately 40 states); MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, INSTITUTIONAL SERVICES, POLICY AND PROCEDURE MANUAL, Procedure No. 1517-1.1, *Religious Programs and Activities* (Dec. 15, 1995), at 1 ("This procedure should ensure that inmates have access to the requirements of their religious faith according to the Religious Freedom Restoration Act while ensuring the good order and security of the institution and safety of the inmates and staff."); UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, *Program Statement No. 5360.06* (Aug. 29, 1995), *Subject: Religious Beliefs and Practices of Committed Offenders* (rules effective Sept. 6, 1995).

increase inmates' potential for reintegration into the community upon release, and reduce recidivism. With appropriate information, prison officials can respond positively to inmates' diverse religious practices and requests while maintaining all necessary penological interests.

ARGUMENT

I. BY ENACTING RFRA, CONGRESS TREATED RELIGIOUS EXERCISE AS A FUNDAMENTAL RIGHT IN PRISON SETTINGS, CONSISTENT WITH HISTORIC PRACTICE.

While *amici* States focus on the burdens on their prison systems purportedly caused by RFRA, they ignore the substantial benefits that free exercise of religion brings to the American correctional system. Alexis de Tocqueville, noted for his early survey of American political and social institutions,[8] examined the American penitentiary system with de Beaumont in 1833.[9] They found religion to be an indispensable part of the rehabilitation of criminals isolated by confinement from the general public.[10] Significantly, they concluded that in America, unlike France where prisons were "schools for crime," the presence of religion worked to achieve the remarkably low recidivism rate of one in twenty.[11] This was due not only to the influence of volunteer religious workers visiting prisoners to provide literacy instruction and religious counseling, but also to the prisoners' access to religious materials and

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[8] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Mayer ed., 1969).

[9] G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (1964, orig. pub. 1833).

[10] *See* D. GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 269-70 (1990) (solitary confinement made inmates amenable to moral instruction, even as reformed moral codes presumed their subjects were "free, rational, responsible and self-directed" persons).

[11] DE BEAUMONT AND DE TOCQUEVILLE, *supra* note 9, at 57, 80-102. In those prisons where religion was not integrated into the daily program, the rate of recidivism was more than three times greater. *Id.*

the isolation of inmates from each other that afforded each an opportunity for reading and reflection in silence. These conditions facilitated the experience of contrition, repentance, and a reform of life in transformative ways.[12] Modern day studies have upheld these conclusions.[13]

Congress has periodically expressed concern for the guarantee of certain basic rights to prisoners, particularly their religious liberty.[14] As has been clearly and repeatedly noted by members of this Court, prisoners retain their religious liberty.[15] When Congress enacted RFRA in

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[12] *See* GARLAND, *supra* note 10, at 136 (citing the qualitative shift in the aims of punishment between about 1750 and 1820 throughout Europe and America as "measures to affect the 'soul' of the offender rather than just strike his body . . . [with] the concern . . . less to avenge the crime than to transform the criminal who stands behind it."); *id.* at 203 ("throughout the history of penal practice religion has been a major force in shaping the ways in which offenders are dealt with.")

[13] *See* T. Evans, *et al., Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminology*, 33 CRIMINOLOGY 195 (1995) (research study found participation in religious activities was a persistent and noncontingent inhibiter of adult crime); B. Johnson & D. Larson, *The Potential Benefit of the Faith Factor*, IARCA J. ON COMM. CORRECTIONS 28 (June 1995) ("The evidence demonstrating the benefit of religion in terms of rehabilitation is largely anecdotal, but still important.").

[14] *See* 139 CONG. REC. S14461-01, S14462 (daily ed. Oct. 27, 1993) (statements of Sens. Lieberman, Hatch and Danforth); *cf.* W. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 653 n.204 (1979) (remarks on the efforts of the 95th Congress to address prisoners' need for enforcement of their rights).

[15] *See Lewis v. Casey*, —— U.S. ——, 116 S.Ct. 2174, 2205 (1996) (Souter, J., concurring and dissenting) ("prisoners do not entirely forfeit certain fundamental rights, including . . . the right to free exercise of religion"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion.") (citations omitted); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (marriage is a fundamental right allowed to prisoners when there is no threat to security, order, or

1993, it specifically considered the importance of religious exercise to prisoners,[16] following the time-honored recognition that religion is not only among fundamental rights, but is a "preferred" right of the "highest order."[17] A fundamental right literally expressed in the text of the Constitution is, *a fortiori*, entitled to no less protection than is always reserved for nonliteral rights found in the concept of liberty.[18] Unlike *Lewis v. Casey*, 116 S.Ct.

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public safety and has spiritual significance to many religious; and marriage commitment "may be an exercise of religious faith, as well as an expression of personal dedication."). *But cf. Lewis v. Casey*, 116 S.Ct. at 2185 ("a prison regulation impinging on inmates' constitutional rights 'is valid if it is reasonably related to legitimate penological interests.' ").

[16] *See, e.g.*, 139 CONG. REC. S14461-66 (statements of Sens. Hatch, Lieberman, Coats, Dole, Hatfield, and Danforth).

[17] *See* 139 CONG. REC. S14350-01, S14364 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) ("religious liberty . . . is the most fundamental liberty any human being can claim . . . Even the most scorned in our society, prison inmates, have a legitimate interest in religious liberty."); S. REP. No. 111, 103d Cong., 1st Sess., at 9 & n.22 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892 (citing cases); *see also Gilbert v. Minnesota*, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (Fourteenth Amendment guarantees more than the liberty to acquire and enjoy property); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (per Cardozo, J.) (Bill of Rights made applicable to the states to preserve principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (fundamental liberties are those "of the individual which history has attested as the indispensable conditions of an open as against a closed society"); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment . . . are to be read together . . . to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

[18] *See M.L.B. v. S.L.J.*, —— U.S. ——, 117 S.Ct. 555, 1996 WL 716328 (Dec. 16, 1996) (liberty interests in marriage and family life, *id.* at *9, and fundamental political rights, *id.* at *13); *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (liberty interests in personal

at 2187 (Thomas, J., dissenting) where Justice Thomas noted a weakness in constitutional analysis when courts cannot agree upon the constitutional source of "the supposed right," in the present case religious exercise is expressly found in the text of the First Amendment. When Congress enacted RFRA by exercising its power under Section 5 of the Fourteenth Amendment, it was obligated to treat the unalienable right of free religious exercise with the *same* high level of protection that has been accorded *all* fundamental rights (many of which are found only implicitly in the concept of liberty or due process). That the exercise of the fundamental right of religious freedom is necessarily reduced in prison, should not lessen its significance when no governmental interest justifies its denial in a specific instance.

When Congress considered prisoners' rights of religious exercise, it accepted the premise that religious exercise is a basic or fundamental right that reaches even into prison. By enacting RFRA, Congress safeguarded prisoners' rights where substantial burdens upon religious exercise give rise to claims that may then be assessed in light of legitimate penological interests.[20]

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security of an inmate were implicated upon involuntary transfer to mental institution); *Griswold v. Connecticut*, 381 U.S. 479, 508-09 (1965) (Black, J., dissenting) (no textual basis existed in Constitution for privacy right that Court found in the penumbra of Bill of Rights); *Truax v. Raich*, 239 U.S. 33, 41 (1915), *cited with approval in Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 & n.23 (1976) (liberty interest found in right to be eligible to work); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (liberty interest in interstate travel); *see also M.L.B. v. S.L.J.*, 1996 WL 716328 at *23 nn.3-5 (Thomas, J., dissenting).

[19] *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

[20] *See* H.R. REP. No. 88, 103d Cong., 1st Sess. at 7 (1993); S. REP. No. 111, 103rd Cong., 1st Sess., at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899; 139 CONG. REC. S14451-01,S14462-66 (daily ed. Oct. 27, 1993) (statement of Sens. Lieberman, Coats, and Hatfield); *see also* 139 CONG. REC. S14468 (daily ed. Oct. 27,

Congress enacted RFRA because it found that governmental officials were substantially burdening religious exercise without compelling justification. Congress considered RFRA expressly remedial, by finding in past deprivations a basis for the future protection afforded by the authority of its law. It thereby equally protected citizens in all states when their unalienable right to religious liberty "is substantially burdened by government." Congress considered religious liberty as one of those fundamental rights this Court has time and again recognized as within the broad sweep of the due process and equal protection provisions of the Fourteenth Amendment, rights found essential to the concept of ordered liberty, inherent in human nature, and consequently unalienable.[21]

A. However Qualified by Governmental Interests, Free Religious Exercise Is Important To Rehabilitate Inmates and Reduce Recidivism Rates.

Despite many changes in penal theory and practice since 1833, concern for the rehabilitation of criminals

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1993) (recording rejection of proposed Senate amendment to exempt inmates' claims from RFRA); 139 CONG. REC. S14364 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (opposing amendment to exempt inmates' claims and striking a reasonable balance between competing interests).

[21] *See Smith*, 494 U.S. at 895 (O'Connor, J., concurring) ("The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order."); *Lewis*, 116 S.Ct. at 2206 (Stevens, J., dissenting) ("Within the residuum of liberty retained by prisoners are freedoms identified in the First Amendment to the Constitution: freedom to worship according to the dictates of their conscience . . . [citations] . . . While the exercise of these freedoms may of course be regulated . . . they may not be obliterated either actively or passively. Indeed, our cases make it clear that the States must take certain affirmative steps to protect some of the essential aspects of liberty that might not otherwise survive in the controlled prison environment.") (citations omitted).

remains identified with moral and religious influence.[22] In the experience of both *amici*, the greater the inmate participation in their programs, including religious worship, educational and religious seminars, and Bible studies, the greater the likelihood of rehabilitation, successful reentry into society, and restoration to their spouses, children, and religious communities. In a preliminary study conducted by the National Institute of Healthcare Research at four New York State prisons utilizing follow-up for two years to assess recidivism among participants in Prison Fellowship Ministry programs, inmates attending ten or more Bible studies exhibited significantly lower rearrest rates as compared to nonparticipants or low participants.[23] If recidivism is the greatest problem facing

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[22] *See Hudson v. Palmer*, 468 U.S. 517, 557-58 (1984) (Stevens, J., concurring and dissenting) ("The view . . . that an inmate is a mere slave is now totally rejected. . . . [R]estraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 n.8 (1987) (Brennan, J., dissenting) (quoting *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969) on the rehabilitative function of religion and its importance to the inmate's dignity and individuality, and citing studies of the "important role of religious commitment in penological rehabilitation"); *see also* W. MOBERLY, THE ETHICS OF PUNISHMENT 210 (1968) ("The object is that society should first make alive and deepen in itself, and secondly should convey to all its members, including the wrongdoer, a vivid sense of the wicked and destructive character of the wrongful act."); R.A. Duff, *Expression, Penance and Reform*, in J.G. Murphy, ed., PUNISHMENT AND REHABILITATION 198 (3d ed. 1995) ("We owe it to every moral agent to treat him as one who can be brought to reform."); *id.* at 169-209; H. Morris, *A Paternalistic Theory of Punishment*, in *id.* at 158; H. Morris, *Persons and Punishment*, in *id.* at 93 ("Society is today sensitive to the infringement of injustice in punishing the innocent; elaborate rules exist to avoid this evil. Society should be no less sensitive to the injustice of failing to bring back to the community of persons those whom it is possible to bring back.").

[23] T. O'Connor, *The Impact of Religious Programming on Recidivism, the Community and Prisons*, IARCA J. ON COMM. CORRECTIONS 13 (June 1995); M.C. Young, *et al.*, *Long-Term Recidi-*

corrections, and of all programs relevant to reducing the rate of recidivism, religious programs rank among the most effective, then these programs should be highly regarded by administrators as conductive to their penological objectives. In fact, RFRA has facilitated a proliferation of religious prison programs that have had very positive effects within prisons.

B. RFRA Protects Prisoners' Fundamental Religious Rights Without Impairing Legitimate Governmental Interests.

RFRA now provides a crucial legal remedy for inmates whose religious rights have been improperly curtailed by prison officials.[24] Congress had specifically considered

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vism Among Federal Inmates in Volunteer Prison Ministries, 22 J. OF OFFENDER REHAB. 97 (1995) (research findings suggested religious program content may contribute to long-term rehabilitation of certain kinds of offenders).

[24] Such denials provided substantial support for Congress' enactment of RFRA. For example, several Senators cited *McLellan v. Zavaras*, No. 93-B-2365 (D. Colo., dismissed without prejudice, Dec. 21, 1993) (unreported decision), where an inmate was allowed to attend a local Episcopal church for Sunday worship services and to serve as its organist and lay reader at the service, but was forbidden under the Department of Correction's no-intoxicant rule 507 to receive consecrated communion wine at church during Holy Eucharist. *See* 139 CONG. REC. S14461-01, S14462-67 (daily ed. Oct. 27, 1993) (statements of Sens Danforth, Hatfield, and Lieberman); *see also id.* at S14467 (statement of Sen. Danforth) (Catholic inmates in California county jail denied permission to possess rosary beads on grounds it would create an impression of favoritism); copies of FL DOC Inmate requests and responses on file with *amici* Aleph Institute, *e.g.*, Nov. 29, 1993: Jewish inmates in Florida were denied Tefillin bindings (to be kept in the chaplain's office and worn only for daily prayer) as a possible security risk when other inmates were allowed belts, shoe strings, weights, chairs, tables, etc.

See, e.g., Death Row Inmate Wins Fight to Wear Yarmulke, MIAMI HERALD 11A (Apr. 4, 1996) (for many years orthodox Jewish inmate on death row was denied right to wear yarmulke for "security reasons" until court decided in RFRA suit that the ban on yarmulkes was "overly restrictive" and "prison security would not be compromised"); P. Nolan, *Justice Spotlight*, 13 JUS-

prisoners' religious rights as weighed against the governmental interests in the operation of prisons.[25] Indeed, the application of RFRA to prisoners was one of the most hotly-debated aspects of the deliberations. After lengthy consideration, factfinding and debate, the Senate voted against an amendment to exclude prison inmates from RFRA's protections.[26] In doing so, it considered—and rejected—all of the arguments by prison officials repeated here.

Claims arising under RFRA may have caused administrative inconvenience in determining how accommodation could be achieved where religion, its needs and observances were not understood, or where the practices involved only a small percentage of the inmate population. RFRA now gives inmates hope that their requests will not be summarily ignored, delayed or denied *de facto* by transfer. RFRA now requires that sincere inmate requests for religious exercise be respected *ab initio* and denied only on proper grounds.

TICE REPORT (Jan. 1997) (prison officials interfered with religious worship of Baptists, Catholics and other "traditional" faithful); *Standing for Religious Freedom*, 13 JUSTICE REPORT (Jan. 1997) (Catholic women inmates were denied permission to hold Christmas Mass at the L.A. County women's jail, as "all activities were cancelled during the holidays" until RFRA action was threatened). *See also Campos v. Coughlin*, 854 F .Supp. 194 (S.D.N.Y. 1994).

[25] The growing use of private prisons—now capable of incarcerating approximately 50,000 persons, *see Testimony Regarding Correctional Privatization: Oversight Hearing on Matters Relating to Bureau of Prisons before Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong.*, 1st Sess. (June 8, 1995) (statement of Charles Thomas)—also raises important legal questions, including whether the State can contract away inmates' free exercise rights, whether private custodians are subject to RFRA and other federal laws as are their state counterparts, and whether private prison guards enjoy the same immunity as state guards, a question pending before this Court, *see McKnight v. Rees*, 88 F.3d 417 (6th Cir.), *cert. granted*, —— U.S. ——, 117 S.Ct. 504 (Nov. 27, 1996).

[26] *See* 139 CONG. REC. S14468 (daily ed. October 27, 1993).

Since RFRA's enactment, no genuine governmental interest in safety, security and order has been lost or compromised due to successful RFRA claims. Prisons have not experienced disorders or breaches of security where proper training procedures have been followed by officials. Spurious RFRA claims have been or may in the future be filed by inmates because such spurious claims were also filed before RFRA. In a settling period of transition, adjustments to new law take time and the purported burden of adjustments is no basis to invalidate a statute. Finally, new federal legislation that diminishes the incentive and ability of inmates to press frivolous lawsuits is alleviating administrative burdens from excessive inmate litigation.[27]

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[27] On April 26, 1996, Congress enacted the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626 ("PLRA"), primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act . . . many of which are routinely dismissed as legally frivolous." *Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996). The Act applies to all civil proceedings and appeals, *In re Nagy*, 89 F.3d 115, 116-17 (2d Cir. 1996), including those raising RFRA. *See, e.g., Sasnett v. Sullivan*, 91 F.3d 1018, 1023 (7th Cir. 1996); *James v. Lane*, —— F.Supp. ——, 1996 WL 738957 (N.D.Ind. Dec. 13, 1996) (terminating consent decree obtained by Muslim inmates pursuant to RFRA). *Amici* share the concerns of prison officials over frivolous inmate litigation, but there is simply no reason to believe that RFRA's enactment is generating any greater degree of litigation. *See Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (*"As of 1981*, Mr. Green had filed between 600 and 700 complaints in state and federal courts, many of which had been dismissed as malicious or frivolous.") (emphasis added). The means Congress chose to accomplish these ends—discouraging and limiting the ability of inmates to bring malicious or frivolous civil claims of any variety (religious or otherwise)—addresses the underlying concerns of the States opposing RFRA without undermining the paramount interest of religious freedom.

Courts and prison officials are certainly aware of PLRA's passage. As of January 3, 1997, the PLRA had helped the federal appellate courts dispose of more than 200 appeals—almost all by summary unpublished disposition. *See Inmate Litigation and the PLRA*, in CORRECTIONS COMPENDIUM: THE NATIONAL JOURNAL FOR CORRECTIONS, Volume XXI, No. 12 (December 1996).

As patterns of claims emerge from inmates, including those representing a diversity of minority religions in American culture, new procedures and administrative efficiency will follow. State officials can follow their federal counterparts in acquiring better knowledge and skill in accommodating such claims, and can distinguish other claims that are either insincere or that pose an unreasonable risk to the necessary interests of prison security and order. Indeed, the Federal Bureau of Prisons and some states have already established working systems.[28] Instead of misunderstanding or ignoring the needs of minorities because their religious practices do not conform to the public's perception of what should constitute a religious practice, state chaplains and wardens can also learn to reach appropriate accommodations without rancor or disparagement of religion.

Indeed, the brief by *amici* States actually illustrates that Congress responded to an important problem with respect to prisoners' religious freedom. *Amici* States complain that RFRA requires them to investigate religious claims and accommodate "even the most unusual and isolated demands," *Amici* States' Br. at 4, apparently something they felt no need to do otherwise. They claim that RFRA "diverts" chaplains from delivering religious services and maintaining pastoral relationships because of increased

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[28] *See, e.g.*, National Institute of Corrections Academy live video conference, July 27, 1995, held to educate federal and state corrections officials about RFRA. Rev. Bryn Carlsen, Director of Religious Services, Federal Bureau of Prisons, listed eight strategies for the implementation of RFRA: (1) Determine specifically what is being requested; (2) Determine what is being done elsewhere; (3) Consult local and national religious resources; (4) Determine what, if any, court cases have set precedent; (5) Determine what is the least restrictive alternative available; (6) Establish an institutional evaluation process for determining questions of compelling interest and least restrictive means; (7) Institute a system-wide administrative process for making the decisions; (8) Ensure that decisions contribute to equity and consistency. See also the Washington and Missouri state policies discussed *supra* at note 7.

demands. This claim tacitly concedes that the needs of religious minorities have long been ignored or denied.

RFRA undoubtedly requires an adjustment for those prison officials who are insensitive to the importance of the spiritual dimension of inmates' lives, affected by the standardization and depersonalization that diminishes dignity and humanity. When inmates are first incarcerated, they relinquish driver's licenses and watches, signifying submission to authority, a deprivation of autonomy associated with personal mobility and the ability to tell time. Inmates are assigned a personal number that becomes, instead of their name, the means of their official and primary identification. Loss of freedom, an obligation to "do" time, demoralizing feelings of disgrace as outcasts, counting the days to a parole hearing or release as a numbered individual—all become features of a prisoner's life.[29] When a prisoner's right to the exercise of religion can nevertheless be successfully asserted, it signifies that society does not intend incarceration to extinguish the human significance and meaning derived from free religious exercise.[30]

Just as Congress, in effect, rejected the notion that a prisoner's right to religious exercise diminishes the authority of state officials, so it implicitly recognized that a prisoner's spiritual life is not held at the sufferance of the state or withheld as society's retribution for crime. Inmates can and do share with persons outside prison walls

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[29] *See* C. Colson, *Towards an Understanding of Imprisonment and Rehabilitation*, in J. Stott & N. Miller, eds., CRIME AND THE RESPONSIBLE COMMUNITY 153, 155-158 (1980); W. MOBERLY, *supra* note 22, at 264.

[30] J.B. Weinstein, *Prison Need Not Be Mandatory: There Are Options Under the New U.S. Sentencing Guidelines*, 28 No. 1 JUDGES' J. 16 (Jud. Admin. Div. Amer. Bar Ass'n 1989) (statement of the Hon. Judge Jack B. Weinstein: "Rabbi Sholom Lipskar, the guiding force of the Aleph Institute, and his associates understand and force us to face the fact that each person deserves to be treated with respect as an individual personality and not as an integer, a faceless number.").

a spiritual perspective on which their hope for the future rests, a faith that transcends the difficulties of confinement, loss of rights, poverty, physical disabilities due to age, and even impending death. Faith's exercise must not be sacrificed because states may have fewer dollars to care for rising prison populations.

No longer should it be assumed that accommodating inmates' religious needs can be deferred or denied by prison officials if the requests are nominally inconvenient. Prior to RFRA, chaplains were not encouraged to facilitate responses to inmates' requests for religious accommodation, which were often perceived as interfering with the regimen, routine, and uniform order of prison life. Now, where religious requests are involved, chaplains can obtain further resources and education to help serve religious traditions, process requests for religious exercise, and consider each on its merits. Appropriate requests should now receive prompt and serious consideration because of RFRA.

Congress did not intend RFRA to result in a judicial disregard of necessary penological interests. Courts have upheld, against RFRA challenges, actions or policies of prison administrators for a variety of reasons.[31] More notably, federal prison administrators have utilized RFRA compliance programs to assist in accommodating legitimate requests for religious accommodation. As a result of these federal efforts, the administrative burden is mini-

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[31] *See, e.g., Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489 (6th Cir. 1995) (denial of pass to attend religious services justified on security grounds); *Ishmawiyl v. Vaugh*, 1995 WL 461949 (E.D. Pa. Aug. 1, 1995) (mother of Muslim inmate allowed to visit and required to unveil before female corrections officer when officer was available); *George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (restricted literature that inmate acknowledged fostered racial animosity); *Rhinehart v. Gomez*, 1995 WL 364339 (N.D. Cal. June 8, 1993) (mandatory tuberculosis testing didn't burden religion).

mized.[32] RFRA's focus on making all reasonable efforts to meet legitimate needs benefits not only inmates, but also society in increasing rehabilitation and reducing the costs of recidivism.

II. RFRA IS A PROPER EXERCISE OF CONGRESS' CONSTITUTIONAL AUTHORITY.

RFRA is before this Court with the weighty presumption of constitutionality accorded to acts of Congress and the support of every appellate court that has decided its validity as applied to *state* action.[33] Moreover, the only court to address RFRA's constitutionality as applied to *federal* action also upheld it.[34] Nevertheless, Petitioner and its supporting *amici* contend that Congress lacked

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[32] *See* 139 CONG. REC. S14461-01, S14462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman) (noting absence of evidence that without a prison exemption RFRA "will open the floodgates for prisoners' religion-based claims.").

[33] *See Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir.), *rehearing and rehearing en banc denied*, 83 F.3d 421, *cert. granted*, 117 Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3370 (1996); *South Jersey Catholic School Teacher Ass'n v. St. Teresa Church Elementary School*, 290 N.J.Super. 359, 382, 675 A.2d 1155, 1167 (App.Div.), *cert. granted*, 146 N.J. 567, 683 A.2d 1162 (1996); *Gallo v. Salesian Soc'y*, 290 N.J.Super. 616, 643 n.3, 676 A.2d 580, 593 n.3 (App. Div. 1996); *State v. Miller*, 196 Wis.2d 238, 247-48, 538 N.W.2d 573, 577 (Wis. App. 1995), *aff'd*, 202 Wis.2d 56, 549 N.W.2d 235 (1996); *see also United States v. Bauer*, 84 F.3d 1549, 1558-59 (9th Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 267 (1996).

[34] *See E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996); *see also* M. Paulsen, *A RFRA Runs Through It*, 56 Mont. L. Rev. 249, 253 (1995) ("Congress possesses the same power to pass RFRA, as RFRA concerns federal statutes, as it had to pass those other federal statutes in the first place."); D. Laycock & O. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 211 (1994) (RFRA "is both a rule of interpretation for future [and past] federal legislation and an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place.").

constitutional authority to enact RFRA and violated the separation of powers by attempting to overrule or supersede this Court's decision in *Smith*. Because Respondents and other supporting *amici* address these arguments, *amici* here focus only on aspects of the Equal Protection Clause and Congresss' authority to legislate in the wake of *Smith* that have particular relevance to free exercise rights of inmates under RFRA.

A. RFRA Directly Enforces the Equal Protection Clause of the Fourteenth Amendment.

In adopting RFRA, Congress expressly relied upon its power under the Fourteenth Amendment, the First Amendment, and the Necessary and Proper Clause of Article I, Section 8 of the Constitution.[35] The Fourteenth Amendment authorizes Congress to enact legislation to enforce the Amendment's requirement that no State shall: (1) "abridge the privileges or immunities of citizens of the United States"; (2) "deprive any person of . . . due process of law"; or (3) "deny to any person . . . the equal protection of the laws."[36] The arguments over RFRA's

[35] *See* S. REP. No. 111, 103d Cong., 1st Sess. at 13-14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903; H.R. REP. No. 88, 103d Cong., 1st Sess. (1993).

[36] Congress' express reliance on the Fourteenth Amendment does not diminish any other source of legislative power that may support RFRA. For instance, the Article 1, Section 8 Commerce Clause power forms the basis for other civil rights statutes, such as the Civil Rights Act of 1964. In unanimously upholding that Act—which prohibits discrimination on the basis of "religion" as well as "race, color, and national origin" (and "sex," as later amended)—under the Commerce Clause, this Court spoke in terms that equally support RFRA. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964) ("That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid."); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) ("a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. . . . [C]ongress appropriately considered the importance of that connection with the knowledge that the discrimination was but 'representative of many others throughout the country, the total incidence of which if left unchecked may

validity, however, have focused almost exclusively on congressional power to enforce *not* an express provision of the Fourteenth Amendment but an "incorporated" right, *i.e.*, the right to religious freedom secured by the Free Exercise Clause of the First Amendment.[37] *Amici* agree

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well become far reaching in its harm to commerce.' ") (citation omitted). In the prison context, a substantial effect on interstate commerce is not difficult to conceptualize, given the increasingly common practice of interstate transfer of inmates and the growth market in "privatized" prisons (where fundamental rights such as free exercise may be lost).

Because the Court in *Heart of Atlanta* and *McClung* unanimously found the Civil Rights Act to be authorized by the Commerce Clause, the Court found it unnecessary to also consider whether the Act was authorized by Section 5 of the Fourteenth Amendment. Nonetheless, at least two justices would have specifically held that the Fourteenth Amendment also authorized the Act as applied to these private businesses. *See Heart of Atlanta*, 379 U.S. at 281 (Douglas, J., concurring) ("The rights protected are clearly within the purview of our decisions under the Equal Protection Clause of the Fourteenth Amendment."); *id.* at 293 (Goldberg, J., concurring) (Fourteenth Amendment "guarantees to all Americans the constitutional right 'to be treated as equal members of the community' "). The Act's application to the states as employers is independently authorized by Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976); *accord Guardians Ass'n of NY City Police Dep't v. Civil Service Comm'n*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1373 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *United States v. Commonwealth of Virginia*, 620 F.2d 1018, 1023-25 (4th Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States v. City of Chicago*, 573 F.2d 416, 423 (7th Cir. 1978) ("It is undisputed that the 1972 Amendments to Title VII are an enactment to enforce the anti-discrimination prohibitions of the Equal Protection Clause . . . .").

Whether power for Title VII's application to the States is derived from the Commerce Clause, the Fourteenth Amendment, or a combination thereof (*e.g.*, *Scott*, *supra*), both lines of reasoning support Congress' enactment of Title VII and RFRA as anti-discrimination statutes.

[37] *Cantwell*, 310 U.S. at 303.

with Respondents and the appellate courts that congressional power under the Fourteenth Amendment includes the power to enforce such incorporated rights,[38] particularly the right of religious freedom secured by the Free Exercise Clause,[39] but congressional power to enact RFRA is not so limited. RFRA is also designed to enforce *directly* the Fourteenth Amendment's guarantee of "equal protection," at the heart of which, like the Free Exercise Clause, lies the principle of anti-discrimination or nonpersecution.[40] The drafters of the Fourteenth Amendment intended the Amendment not only to protect against *de jure* facial religious discrimination, but also to guard against *de facto* discrimination evidenced by discriminatory effects on religious practice.[41]

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[38] *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); *Katzenbach v. Morgan*, 384 U.S. 641, 651-55 (1966).

[39] Free exercise of religion has long been recognized as part of the liberty interest substantively protected by the Due Process Clause. *See Cantwell*, 310 U.S. at 303. This right was also considered one of the "privileges or immunities of citizens of the United States" when the Fourteenth Amendment was adopted. K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. REV. 1106, 1146-49 (1994), and there is no apparent impediment to recognizing it as such. *See, e.g., Rouser v. White*, 944 F. Supp. 1447, 1996 WL 631130, *4 & n.8 (E.D. Cal. 1996) (upholding RFRA as a proper enforcement of Privileges or Immunities Clause of Fourteenth Amendment); *cf.* R. T. Cruz, Comment, *Animal Sacrifice and Equal Protection Free Exercise:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 17 HARV. J. L. & PUB. POL'Y. 262, 272 (1994) (suggesting that the Free Exercise Clause may be incorporated through the Equal Protection Clause).

[40] *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993) (Free Exercise Clause embodies "fundamental nonpersecution principle"); *id.* at 532 ("historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause"); *id.* at 540 (Kennedy, J., joined by Stevens, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

[41] *See Lash, supra* note 39, at 1149 (1994) (authors of the Fourteenth Amendment intended it to protect substantive religious ex-

Smith articulated formal neutrality of government action as a constitutional standard of protection for religious exercise. Post-*Smith* concerns about religious discrimination in America due to government insensitivity and hostility to religious practice prompted the enactment of RFRA [42] and related anti-discrimination measures taken by the legislative and executive branches to protect religious exercise.[43] After several rounds of hearings on RFRA, Congress "concluded that *Smith*'s focus on facial

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ercise against government interference); *cf. Bush v. Vera*, —— U.S. ——, 116 S. Ct. 1941, 1969 (1996) (O'Connor, J., concurring).

[42] *See, e.g., Flores*, 73 F.3d at 1358-59 ("Witnesses at congressional hearings spoke eloquently of the need for legislation to defend individuals, particularly those from minority religions, from generally applicable laws that burden the exercise of religion. [T]he Senate Judiciary Committee found the need for legislation to 'assure that all Americans are free to follow their faiths free from governmental interference.'") (citations omitted).

[43] *E.g.*, the 103d Congress passed the American Indian Religious Freedom Act Amendments of 1994 ("AIRFA") to remedy long-standing religious discrimination against Native Americans. 42 U.S.C. § 1996a (1994). As part of its welfare reform law, the 104th Congress included an anti-discrimination provision that allows states to contract with private organizations to provide welfare services but prohibits states from discriminating against religious organizations in administering the federally funded programs. 42 U.S.C. § 604a (1996). The President has not only actively supported RFRA and these other anti-discrimination provisions, he has also issued Guidelines to help defuse the religion-hostile environment in public schools. *Text of President Clinton's Memorandum on Religion in Schools*, N.Y. TIMES, July 13, 1995, at B10. In response to apparent hostility to religion evinced by the Equal Employment Opportunity Commission's proposed Guidelines on Religious Harassment in public and private workplaces, the 103d Congress directed the EEOC in promulgating final regulations to "make explicitly clear that symbols or expressions of religious belief consistent with the First Amendment and the Religious Freedom Restoration Act of 1993 are not to be restricted and do not continue proof of harassment." P.L. 103-305, § 526 (Amendment No. 1804). Indeed, concerns about government insensitivity and hostility to religious belief and practice have led Congress to study the need for a religious freedom amendment to the United States Constitution (*e.g.*, Hearings Before House Com-

neutrality and general applicability has been ineffective in identifying laws motivated by antagonism to a religion or to religion in general." *Flores*, 73 F.3d at 1359. During the three years that Congress studied the need for RFRA, it found abundant evidence that religious discrimination was, in the words of *McClung*, 379 U.S. at 301, "not merely a state or regional problem but was one of nationwide scope." Congress found especially egregious examples of discrimination against adherents of minority religions, who are often subject to the discriminatory effects of facially neutral laws and powerless to obtain a political remedy.[44] RFRA was designed to remedy and prevent such instances of disguised or *de facto* discrimination. As stated by the court below:

> Congress could reasonably conclude that more exacting scrutiny of facially neutral legislation that burdens a religious practice is needed to protect adherents of minority religions. [R]elatedly, Congress could reasonably conclude that seeking religious exemptions in a piecemeal fashion through the political processes, particularly at the state or local government level, would place minority religions at a disadvantage. *See* The Federalist No. 10 (James Madison).[45]

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mittee on the Judiciary, Subcommittee on the Constitution (July 23, 1996)).

[44] *See, e.g.*, H.R. REP. No. 88, 103d Cong., 1st Sess., at 6 & n.14 (1993); 139 CONG. REC. S14461-01, S614467 (daily ed. Oct. 27, 1993) (statement of Sen. Danforth).

[45] *Flores*, 73 F.3d at 1360 (citations omitted). Chief Judge Posner came to a similar conclusion in *Sasnett v. Sullivan*, 91 F.3d 1018, 1021-22 (7th Cir. 1996):

> [C]ongress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful right. . . . Prisoners, Christian or otherwise, are a good example of a group whose claims to be able to exercise a meaningful freedom of religion are unlikely to be heard in state legislatures.

B. RFRA Does Not Improperly Overrule or Supersede *Smith*.

Petitioner's arguments distort the standard for constitutional review as well as RFRA's legislative history. Statements of individual lawmakers critical of *Smith* are irrelevant to determining the constitutional validity of their legislation.[46] Moreover, despite the motives that Petitioner attributes to certain lawmakers, the "more natural reading of the Act's provisions [is] that Congress's objective . . . was to overturn the *effects* of the *Smith* decision, not the decision itself." *EEOC v. Catholic Univ.*, 83 F.3d at 469 (emphasis added).[47] Even assuming the motives ascribed by Petitioner, RFRA "could still be within the scope of section 5 if *its effect* is, without infringing any constitutional rights, to make the legal remedies against violations of the free-exercise clause more effective because requiring less proof." *Sasnett*, 91 F.3d at 1021 (emphasis added).

RFRA does not negate *Smith*, but is its complement. As *Hialeah* explains, *Smith* retains the most "exacting scrutiny" of government actions in four instances—when government regulation: (1) is *not neutral, i.e.*, targets religious conduct or believers either facially or as applied in particular instances, *Hialeah*, 508 U.S. at 533-34; *Smith*, 494 U.S. at 878-79; (2) is not *generally applicable*,

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[46] *See Sasnett*, 91 F.3d at 1021 ("[I]t is not the motive of the legislators that is important . . . but whether the statute they pass is within the scope of their constitutional authority.").

[47] *Accord United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) (RFRA "does not present itself as an interpretation of the Constitution overruling *Smith*; rather it consists of a command that must be followed as a matte rof federal law."). Indeed, properly viewed as a whole, RFRA's legislative history clearly demonstrates proper congressional purposes. *See, e.g.*, S. REP. No. 111, 103d Cong., 1st Sess. at 14 n.43 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903-04 (RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action. . . ."); H.R. REP. No. 88, 103d Cong., 1st Sess. at 1 (1993); *id.* at 15 n.3.

i.e., selectively burdens religious exercise, *Hialeah*, 508 U.S. at 542; *Smith*, 494 U.S. at 879-81; (3) creates a system of *individualized government assessment* of the reasons for the relevant conduct, allowing *individualized exemptions* from a general requirement, *Hialeah*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; or (4) burdens religious freedom in conjunction with other constitutional rights, *i.e.*, a *hybrid* situation, *Smith*, 494 U.S. at 881-82.

In each of these four instances, the government action "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Hialeah*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878-79).[48] Indeed, the lower courts have not hesitated to invalidate government action in these instances.[49]

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[48] The Court's application of the compelling state interest test to the free exercise claim in *Hialeah* completely rebuts the arguments of RFRA's opponents that the compelling interest test is "incompatible" with free exercise adjudication and that *Smith* "abandoned" it due to judicial "inability" to apply it.

[49] *See, e.g., Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (invalidating under *Smith/Hialeah* Army regulations directly burdening religion); *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994) (condemning under *Smith/Hialeah* city's action that partially blocked access to religious tent meeting); *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) (applying *Smith* to condemn city's charitable solicitation law as not generally applicable), *cert. denied*, —— U.S. ——, 115 S.Ct. 54 (1994); *Rader v. Johnston*, 924 F.Supp. 1540 (D. Neb. 1996) (invalidating under *Smith/Hialeah* action of state university refusing religion-based exemption); *Keeler v. Mayor & City Council of Cumberland*, 940 F.Supp. 879 (D. Md. 1996) (invalidating under *Smith/Hialeah* historic landmark ordinance because city refused to extend its system of individual exemptions to case of religious hardship); *First Covenant Church v. City of Seattle*, 120 Wash.2d 203, 840 P.2d 174 (1992) (invalidating under *Smith* historic landmark ordinance because it singled out religious facilities, invited individualized assessments, and burdened free speech in addition to free religious exercise, *i.e.*, hybrid claim); *First United Methodist Church v. Hearing Examiner for Seattle Landmarks Preservation Bd.*, 129 Wash.2d 238, 916 P.2d 374 (1996) (applying *First Covenant Church* to prevent landmark designation of church).

RFRA protects religious exercise differently from Smith. Although RFRA applies to neutral laws of general applicability, it establishes a higher threshold for free exercise claims than does *Smith*. Under RFRA, "a plaintiff alleging a violation of RFRA must demonstrate that his right to the free exercise of religion has been *substantially burdened*." [50] This "substantial burden" trigger of RFRA has been debated recently in the federal courts. While the precise statement of the test varies, the clear trend is to interpret the burden requirement consistently with RFRA's legislative history, including congressional approval of Justice O'Connor's burden analysis in *Smith*.[51] The prevailing test for determining the existence of a substantial burden under RFRA requires a claimant to demonstrate that a practice "motivated by a sincerely held religious belief [was] significantly or meaningfully curtailed." [52] The minority test, applied consistently only

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[50] *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (emphasis added); *Storm v. Town of Woodstock*, 944 F. Supp. 139, 146 & n.6 (N.D.N.Y. 1996). A substantial burden exists where the state "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Jolly*, 76 F.3d at 476; *Storm*, 944 F. Supp. at 146 & n.6 (citations omitted).

[51] *See Sasnett v. Sullivan*, 908 F. Supp. 1429, 1440-45 (W.D.Wis. 1995) (detailing legislative history on "substantial burden," including citations to the record quoting *Smith*, 494 U.S. at 893 (O.Connor, J., concurring)), *aff'd*, 91 F.3d 1018 (7th Cir. 1996).

[52] *Sasnett*, 908 F.Supp. at 1444. Other RFRA decisions employing a form of this "religiously motivated" test include: *Sasnett*, 91 F.3d at 1022 (7th Cir. 1996); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175, 1178-79 (7th Cir. 1996); *Jolly*, 76 F.3d at 476-77; *Werner v. McCotter*, 49 F.3d 1476, 1480-81 (10th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 2625 (1995); *Small v. Lehman*, 98 F.3d 762, 766-68 (3d Cir. 1996); *Muslim v. Frame*, 897 F. Supp. 215, *denying reargument of* 891 F. Supp. 226 (E.D.Pa. 1995); *Turner-Bey v. Lee*, 935 F. Supp. 702, 703 (D.Md. 1996); *Stuart Circle Parish v. Board of Zoning Appeals*, —— F. Supp. ——, 1996 WL 685755, *12-16 (E.D.Va. Nov. 26, 1996); *Rouser v. White*, —— F. Supp. ——, 1996 WL 631130, *6-7 (E.D.Cal. Oct. 28, 1996); *In re Hodge*, 200 B.R. 884, 895-96 (Bankr.D.Idaho 1996). This prevailing formulation of the sub-

by the Ninth Circuit, requires a claimant to demonstrate that the burdened practice was (1) "mandated" by the claimant's faith, (2) a "central" tenet or belief of religious doctrine,[53] *and* (3) "substantially" interferred with.[54] The latter test raises the threshold burden on claimants much higher than Congress intended and may defeat RFRA's remedial purpose.[55]

Regardless of which version of the "substantial burden" test applies, the point is that RFRA requires it, whereas *Smith* and *Hialeah* do not. In *Hialeah*, "the Court did not consider whether the ordinances posed a substantial burden . . . but proceeded directly to the compelling interest test after it determined that the ordinances were not neutral or generally applicable." *Rader*, 924 F.Supp. at 1555 & n.28; *accord Hartmann*, 68 F.3d at 979 & nn.3 & 4; *Brown*, 35 F.3d at 849-50. "The rare cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff. Applying such a burden test

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stantial burden test refutes the argument that RFRA is unconstitutional because it purportedly requires courts to judge the "centrality" or "relative importance" of religious benefits.

[53] No court outside the Ninth Circuit has adopted a "centrality" component to the substantial burden test. As recognized by Judge Pollak, every Justice of this Court rejected a centrality inquiry in *Smith*. *See Muslim*, 897 F. Supp. at 220.

[54] *See Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); *accord Stefanow v. McFadden*, —— F.3d ——, 1996 WL 737423, *5 (9th Cir. Dec. 27, 1996). However, even courts within the Ninth Circuit do not always follow *Bryant's* strict test. *See, e.g., Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995); *Malik v. Brown*, 16 F.3d 330, 333-34 (9th Cir. 1994), *as amended*, 65 F.3d 148, 149 (1995); *Friend v. Kolodzieczak*, 65 F.3d 1514, 1522-23 (9th Cir.) (Ferguson, J., dissenting), *as amended on denial of reh'g and reh'g* 1996 WL 631130, *6-7; *In re Hodge*, 200 B.R. at 895-96.

[55] For an analysis of the troublesome consequences of the "central tenet" interpretation of "substantial burden" in the prison context, see D. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 476-77 (1996).

to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Brown*, 35 F.3d at 849-50 (citation omitted).

This difference between RFRA and the Free Exercise Clause is significant. For example, in *Brown*, the Third Circuit invalidated a city government action under *Smith/Hialeah* for "intentionally burdening religious worship," but did not apply RFRA because the resulting burden was not "substantial." *See Brown*, 35 F.3d at 848-49. In such instances RFRA cannot protect against what *Smith* and *Hialeah* absolutely forbid: religious discrimination. *Storm v. Town of Woodstock*, 944 F.Supp. 139 (N.D.N.Y. 1996), is similar in many respects; claimants could meet the constitutional standard under *Smith/Hialeah* but failed to meet the substantial burden threshold of RFRA.[56]

In such cases, government action violates one of the four principles of *Smith/Hialeah* and will likely be invalidated under the First Amendment. In those many instances where government action does not violate a principle of *Smith/Hialeah* but nevertheless "substantially burdens" a person's sincere religion exercise, the action likely violates RFRA, entitling the claimant to an exemption. Thus, far from "reversing" or "superseding" *Smith*, RFRA actually complements it, further safeguarding religious freedom.

C. RFRA Was Enacted in Accordance With *Smith*.

Fundamentally, Petitioner's arguments that RFRA impermissibly overrules *Smith* fail to accord *any* weight to this Court's closing invitation in *Smith* for the political branches to provide the necessary protections for religious exercise that the Court found were neither constitutionally required nor foreclosed.[57] Although RFRA is

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[56] For numerous additional examples, see the cases cited in note 49, *supra*.

[57] *See Smith*, 494 U.S. at 890 ("Just as a society that believes in the negative protection accorded to the press by the First

broader than other legislative accommodations of religion (e.g., religious corporations exemption from Title VII),[58] "Congress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful right." *Sasnett*, 91 F.3d at 1021-22. Moreover, RFRA's broad scope follows from Congress' determination that religious discrimination is a nationwide problem. Congress' provision of a *legislative* solution to such free exercise violations allows legislative flexibility to respond to changed circumstances, including evidence that free exercise violations are not being adequately addressed under existing law,[59] as Congress properly did when it expressly included—despite vigorous objections and much lobbying—the rights of prison inmates within the scope of RFRA's protections. The likely alternative to RFRA—a religious equality

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Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.") (citations omitted).

[58] *See S. Rosenzweig*, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA, and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2527-28 (1996) (RFRA provides a new action for religious discrimination claims in the workplace).

[59] *See M. Pawa*, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1041 (1993); *cf. Vera*, 116 S. Ct. at 1968-69 (O'Connor, J., *concurring*) (upholding the Voting Rights Act as "an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting," and stating that states should assume the constitutionality of the Act) (citing S. REP. No. 97-417, p. 4 (1982), 1982 U.S.C.C.A.N. 177, 181; *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (affirming district court's opinion upholding Voting Rights Act)).

amendment to the Constitution—would not provide such flexibility to respond to new information and changing circumstances.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Supreme Court, U.S.
FILED
JAN 10 1997

No. 95-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Knights of Columbus submits this *amicus curiae* brief in support of respondent P.F. Flores, Archbishop of San Antonio, and intervenor-respondent the United States of America. The Knights, with the consent of all parties, shall address in this *amicus* brief the fourth question presented by the City of Boerne's brief: whether the Religious Freedom Restoration Act is constitutional under the Establishment Clause. *Amicus* urges this Court to hold that RFRA is a constitutional accommodation of religious exercise, and therefore does not run afoul of the Establishment Clause.

The Knights of Columbus is a charitable Catholic family fraternal organization of close to 1.6 million members and their families, totalling nearly six million people. Founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with some 11,000 local councils located in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Phillipines, and several other countries. The Knights of Columbus is the largest lay organization in the Roman Catholic Church.

Since its founding, the Knights of Columbus has been dedicated to several purposes: 1) rendering aid and assistance to its sick, needy, and disabled members and their families; 2) promoting social and intellectual discourse among its members and their families; 3) promoting and conducting educational, charitable, religious, social welfare, war relief, and public relief work; and 4) maintaining a life insurance program for the benefit of its members, their beneficiaries, and their families. Last year alone, the Knights contributed more than $105 million to charitable causes and provided roughly 50 million hours of volunteer service.

In addition, the Knights of Columbus has a long history of advocacy in this Court on issues of importance to the family and the Church, including those involving religious liberty. For example, the Knights underwrote the litigation in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In this case, *amicus* has a strong interest in the Establishment Clause issue raised by the City of Boerne's challenge to the Religious Freedom Restoration Act. The Knights of Columbus defends the constitutional principle that all Americans may freely exercise their faith without hindrance and without punishment from the government. In addition to the government action this Court has held the Free Exercise Clause to require, the Knights of Columbus support further accommodation of religious belief and practice by Congress and the states. *Amicus* therefore opposes efforts such as the City of Boerne's — based on misinterpretations of the Establishment Clause — to hamper or erode the free exercise of religion.

SUMMARY OF ARGUMENT

The Establishment Clause issue raised in this case is quite simple. It centers on the difference between the words "may" and "must" in the context of the First Amendment: *may* Congress enact laws that protect religious exercise beyond the level at which the Constitution dictates such exercise *must* be protected? The City of Boerne implicitly asks this Court to answer "no" — to hold that *only* accommodations of religion compelled by the Free Exercise Clause, as interpreted by this Court in *Employment Div. v. Smith*, 494 U.S. 872 (1990), can pass constitutional muster and that the Establishment Clause permits nothing more. Neither the text of the Constitution nor this Court's precedents support the curious notion that the Constitution permits only what it requires.

This Court's precedents firmly establish that the government may purposefully act to relieve burdens on the exercise of religion. "Where . . . the government acts with the proper purpose of lifting a regulation that burdens the exercise of

religion, we see no reason to require that the exemption come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, is just such a regulation, with just such a purpose. RFRA fits comfortably within the wide field in the constitutional landscape identified by this Court and by others as a zone of permissible "accommodation" of religious exercise. Constitutional guarantees of individual rights, as interpreted by this Court, provide a floor — but not a ceiling — for the protection of those rights. This Court's holding in *Smith* defines, in part, the constitutional floor concerning religious liberty. However, nothing in *Smith* disturbed what the structure of the Religion Clauses and this Court's precedents have long dictated: that the Establishment Clause does not prohibit Congress and the states from enacting additional statutory protection for religious exercise.

The City of Boerne's odd argument that *Smith*, which prohibits the government from purposefully burdening religious exercise, somehow limits Congress's power under the Establishment Clause to purposely relieve burdens on the exercise of religion, fundamentally misconstrues that case. *Smith* held that "if prohibiting the exercise of religion . . . is not the object of [a general law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment [is] not offended." 494 U.S. at 878. But the case by no means held the converse — that government is somehow prohibited from lifting burdens on religion.

Therefore, while *Smith* addressed the contours of the Free Exercise floor, it did not establish a new Establishment Clause ceiling. RFRA lies between the constitutional floor and ceiling as a legitimate accommodation of religion under this Court's precedents. It merely adds an extra level of statutory protection to the Constitution's guarantee of religious liberty — a level of protection that is neither dictated by the Free Exercise Clause nor forbidden by the Establishment Clause.

Such discretionary legislative accommodation of religion has been unanimously upheld by this Court, *see, e.g., Amos*, 483 U.S. 327, and, indeed, was specifically *invited* by this Court in *Smith* itself, *see* 494 U.S. at 890.

The City's argument, therefore, that the Establishment Clause prevents Congress from accommodating religion beyond the requirement of the Free Exercise Clause is supported by neither law nor logic. It would deny Congress and the States any role in protecting religious liberty. It would also render unconstitutional many of the pre-*Smith* accommodations of religion that the former strict scrutiny Free Exercise test required, as well as virtually all of the discretionary legislative accommodations that it allowed. Surely this was neither the intent nor the holding of *Smith*. Rather, under *Smith*, the strict scrutiny accommodations that were formerly constitutionally compelled are still entirely permissible.

The City of Boerne correctly observes that RFRA differs in one respect from some other accommodations of religion previously upheld by this Court, in that it is a general rather than a specific accommodation for any and all religious exercise claims. This difference, however, hardly renders the statute constitutionally suspect. First, governmental exemptions from burdens on religious believers need not "come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. Second, RFRA's general applicability is a virtue rather than a vice under Establishment Clause jurisprudence, because it ensures uniform treatment for members of all religious faiths.

ARGUMENT

THE RELIGIOUS FREEDOM RESTORATION ACT IS A CONSTITUTIONAL ACCOMMODATION OF RELIGIOUS EXERCISE UNDER THE ESTABLISHMENT CLAUSE.

A. There exists a wide area for accommodation of religion between government action that the Free Exercise Clause requires and government action that the Establishment Clause forbids.

This Court has consistently held that "the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987)). Further, "[i]t is well-established . . . that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

The City of Boerne ignores this vital distinction between the accommodation of religion this Court currently holds that the Free Exercise Clause *requires* and the far greater accommodation of religion that the Establishment Clause *permits*. Petitioner purports to identify a constitutional violation in that RFRA's "plain purpose is to provide statutory protection for all substantial burdens on religion, whether constitutionally protected or not." Pet. Br. at 47. The City thus attempts to collapse the floor and ceiling between the two Religion Clauses of the First Amendment[1] and carries to an unprecedented extreme the view that the clauses are in direct conflict. Because the Free Exercise Clause does not mandate

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

RFRA, the City essentially argues, then Congress cannot constitutionally enact it.

The structure of the Constitution and the bulk of this Court's precedents, however, suggest a different approach — one more consistent with the widely held idea that the Religion Clauses do not clash, but rather complement one another, and that they have the same animating goal of protecting religious liberty. On this view, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. Indeed, it is well established that Congress[2] has wide latitude to enact protections for religious exercise.

This latitude has allowed what this Court and commentators from all perspectives have commonly acknowledged as the "accommodation" of religion though "government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."[3] As Justice Brennan explained it, the "government [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (footnote omitted).

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[2] Although this brief will refer only to capacities and limitations of Congress under the Religion Clauses, the same standards apply to the states under the incorporation of the First Amendment into the Fourteenth Amendment Due Process Clause. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (Establishment Clause).

[3] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo.Wash. L. Rev. 685, 686 (1992) ("*Update*"); *see also* Laurence H. Tribe, *American Constitutional Law* § 14-5, at 1166-69 (2d ed. 1988); Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

Smith held that the Free Exercise Clause prevents government from burdening religious activity by "ban[ing] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious beliefs they display." 494 U.S. at 877. This defines only the bare minimum of deference to religion owed by the government under the Constitution. It says nothing about whether the government may, in its discretion, affirmatively relieve burdens on religious exercise — a practice that this Court has long upheld. *See infra* Section B. Such accommodations of religion may be mandatory — that is, compelled by the Free Exercise Clause — or discretionary — that is, neither required by the Free Exercise Clause nor forbidden by the Establishment Clause. *See* Tribe, *supra* note 3, at 1168-69. The "zone of required accommodation recognizes that government's actions impinge on different persons in dramatically different ways, so that truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by a challenged state action." *Id.* at 1168. The same considerations counsel what has been called the "zone of permissible accommodation," *see id.* at 1169, or the "legislative" or "discretionary" accommodation, *see* McConnell, *Update*, *supra* note 3, at 686. The goal of such statutory accommodation is also to promote even-handed treatment for religious exercise, but at a level beyond the minimum dictated by the Free Exercise Clause.[4]

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[4] Much has been made of the fact that RFRA's language copies the language used by this Court in its constitutional strict scrutiny test, apparently in a farfetched attempt to claim that by using the same language in a statute, the words carry the same legal weight that they carried in this Court's interpretation of the Constitution. This is false. RFRA is plainly a statute. It is not a constitutional amendment. Even language repeated verbatim from the Constitution itself does not magically attain constitutional weight, in terms of the strength and priority of its legal command. *Compare, e.g.*, 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

(continued...)

Nevertheless, the City of Boerne, relying on *Smith*, contends it is unconstitutional to accommodate substantial burdens on religion not already protected by the Free Exercise Clause. *See* Pet. Br. at 47. This proposition is absurd. It would mean that the two Religion Clauses are perpetually at war with one another, with a continguous but ill-defined boundary that shifts with each pronoucement of this Court on the requirements of either the Free Exercise or the Establishment Clause. As stated, this reading of *Smith* would render unconstitutional all previous accommodations granted under strict scrutiny analysis that arose from burdens not generated by laws directly targeting religious exercise — which is to say, almost all of them. Because the Free Exercise Clause no longer compels them, petitioner asks this Court to rule that the Establishment Clause affirmatively forbids them. *Smith* does not remotely dictate such a result.

B. Accommodation in the form of specific exemptions for religious exercise does not violate the Establishment Clause.

Not only would the City's position make impossible accommodations previously mandated under the strict scrutiny Free Exercise test, it would also disturb a wide range of discretionary accommodations that have been granted by various government entities, and upheld by this Court, over the nation's history. This would be a monumental shift in Establishment Clause jurisprudence that has taken shape gradually, over time, by the accretion of accommodation precedents. Whatever *Smith* says about mandatory exemptions required by the Free Exercise Clause, it is irrelevant to the boundary at the other end of accommodation law: the

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[4] (...continued)
treaties of the United States.") *with* U.S. CONST. art. III. § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,or which shall be made, under their Authority; . . .").

Establishment Clause still allows all the accommodation that this Court's precedents have held it to allow.

This Court unanimously held in *Amos* that Congress did not run afoul of the Establishment Clause in enacting a statute that exempted only religious institutions from the nondiscrimination requirements of Title VII of the Civil Rights Act. Acknowledging the argument that "an exemption statute will always have the effect of advancing religion" — an argument relied upon in essence by the City of Boerne, *see* Pet. Br. at 47 — this Court held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. Thus, "singl[ing] out religious entities for a benefit," *id.* at 338, is perfectly consistent with Establishment Clause principles.[5]

Amos leaves no doubt that, while the Free Exercise may not compel them, the Establishment Clause certainly does not forbid explicit accommodations of religious exercise. A number of accommodations of religion that have been first held not to be mandated by the Free Exercise Clause have subsequently been enacted by legislative action ultimately held

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[5] This Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), does not impair the relevant principle in *Amos*. Although *Bullock* struck down a statute exempting only religious periodicals from a state sales tax, even the plurality opinion in that case made clear that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 n.8. The accommodation in *Bullock* was struck down simply because, in that case, there was no "concrete need to accommodate religious activity . . . ." *Id.* at 18. While *amicus*, as well as various members of this Court and various legislatures, may disagree about the precise circumstances that counsel a permissive accommodation of religion, denial of an accommodation where there is no legitimate need demonstrated for such an accommodation hardly impairs the principle that accommodations *ought* to be granted, and *may* be granted, when there is such a purpose.

by the courts to comply with the Establishment Clause. For example, exemption from military service on the basis of conscientious objection to war has been held not to be a mandatory Free Exercise right, but this Court upheld a permissive, statutory accommodation granted by Congress. *See Gillette v. United States*, 401 U.S. 437 (1971); *Selective Draft Law Cases*, 245 U.S. 366 (1918). This Court held in *Goldman v. Weinberger*, 475 U.S. 503 (1986) that the First Amendment did not compel an exemption from military requirements for an Orthodox Jew who sought to wear his yarmulke with his Air Force uniform while on duty. Nothing in *Goldman*'s holding, however, prevented Congress from responding the very next year with a statute allowing just such a practice. *See* 10 U.S.C.§ 774. The exemption for Jewish merchants from a Sunday closing law, held not to be compelled in *Braunfeld v. Brown*, 366 U.S. 599, 609 (1961), was upheld against an Establishment Clause challenge in *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218, 219-20 (1962). And, while *Smith* declined to find the right to a mandatory Free Exercise exemption for use of peyote in religious ceremonies, it noted that "a number of States have made an exception to their drug laws for sacramental peyote use." 494 U.S. at 890; *see also Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (upholding DEA exemption for religious use of peyote), *cert. denied*, 495 U.S. 906 (1990).

Permissive exemptions in the public school context have been particularly numerous and generous. They have been held to comport with the Establishment Clause as long as there is no coercion, sponsorship, or endorsement by the state. *Zorach v. Clauson*, 343 U.S. 306 (1952), upheld a New York City program releasing students from school for one hour per week to engage in prayer off the school premises. *Id.* at 312-14. This Court found that, to deny such a permissive accommodation on Establishment Clause grounds, it would be forced to "press the concept of separation of Church and State to . . . extremes." *Id.* at 313. There is no Establishment Clause violation when a legislature "respects the religious nature of

our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.* at 314. Failing to allow such legislative accommodation "would be preferring those who believe in no religion to those who do believe." *Id.* The value and necessity of allowing Congress and state legislatures to respond to the needs of religious citizens in order to ensure equal treatment with nonbelievers retains vitality in this Court's more recent accommodation precedents. *See Hobbie*, 480 U.S. at 148 (Stevens, J., concurring) (quoting *Bowen v. Roy*, 476 U.S. 693, 707 n.17 (1986) (Stevens, J., concurring in part) (For government to treat "'religious claims less favorably than other claims'" is to subject "religious believers [to] unequal treatment.")

Nor does the state accommodation of the religiously motivated practice of schooling one's children at home violate the Establishment Clause, as this Court held in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder*, which held that the state could not charge members of the Amish religion with violating a compulsory school attendance law for refusing to send their children to public school after the eighth grade, was followed by many other accommodations of religious exercise in the context of education. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (no Establishment Clause violation where public school uses federal IDEA funds to provide sign language interpreter for deaf student at Catholic high school); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993) (no Establishment Clause violation to allow religious community group to show religious film in public school classroom after school hours); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (no Establishment Clause violation to Christian Club meeting on public secondary school premises); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (no Establishment Clause violation for blind student studying at Christian college to receive state assistance for vocational training); *Mueller v. Allen*, 463 U.S.

388 (1983) (no Establishment Clause violation where state provides tax deductions for certain educational expenses even if deductions primarily benefit children attending sectarian schools).

Several of the cases that have drawn these boundaries involve accommodation of religion in the form of state benefits to persons who are unemployed for religious reasons. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963), held that the state was constitutionally compelled to grant unemployment benefits to a worker who lost her job for refusing to work on Saturday, her Sabbath. The strict scrutiny test developed in *Sherbert* repeatedly led this Court to hold that government refusal to award unemployment compensation to religious claimants violated the Free Exercise Clause. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). These cases make clear as an independent proposition that the accommodations involved do not violate the Establishment Clause. Extending unemployment benefits to Saturday worshipers "'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'" *Hobbie*, 480 U.S. at 145 (quoting *Sherbert*, 374 U.S. at 409).

The City of Boerne does not suggest outright — nor, to the knowledge of *amicus*, has any other litigant before this Court or any other court — that this significant and growing body of caselaw approving accommodations of religion has been overruled. *Smith* cannot possibly mean that accommodations for Saturday Sabbath, home schooling, conscientious objection to war, and wearing of yarmulkes in the military now violate the Establishment Clause. These religious accommodations are all still valid. And *Smith* plainly invited further legislative accommodations of religious exercise:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. This invitation from the Court was quite clear: the question of whether religious practices ought to be accommodated by the government is a matter to be resolved by the political process — the very process that gave birth to RFRA.

C. RFRA's general legislative accommodation of religious exercise comports on its face with the Establishment Clause.

Petitioner's challenge to RFRA is a facial one; thus *amicus* need only contend here that the statute comports on its face with the Establishment Clause. The City faces an onerous burden in raising its facial challenge to a Congressional statute, yet it offers no convincing Establishment Clause rationale that would render RFRA facially unconstitutional.

First, as a matter of simple logic: if case-by-case accommodations of religious exercise are valid under the Establishment Clause, then there is no reason why a general legislative exemption is not also constitutionally sound on its face. The City of Boerne asserts in its brief that across-the-board exemptions are problematic, *see* Pet. Br. at 47, but it gives no reason for this conclusory statement other than that the "sheer breadth and substantive strength of RFRA necessarily 'advance' religion." Pet. Br. at 47. If this is so, then the "sheer strength and breadth" of this Court's accommodation precedents must "advance religion." Indeed,

the strongest and most general pronouncement — the Free Exercise Clause itself — would by this logic "advance religion."

Nevertheless, the City of Boerne attempts to tag RFRA with a violation of the Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that to be constitutional, a statute must have a secular legislative purpose, must have a principal primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion. *Id.* at 612-13. While it is questionable whether the *Lemon* test is still the appropriate analytical tool in Establishment Clause cases, *Lemon* is certainly the most stringent analysis potentially applicable to this case. Yet RFRA easily passes even the *Lemon* test.

As support for its contention that RFRA flunks the first prong of *Lemon*, petitioner claims: "The plain purpose is to provide statutory protection for all substantial burdens on religion, whether constitutionally protected or not." This implies that the City believes there is something wrong — indeed, something unconstitutional — about the government affording any protection beyond the Free Exercise minimum to those whose religious practice is substantially burdened. Under this analysis, virtually all permissive accommodations of religion, both before and after *Smith*, would fail the *Lemon* test.

Again, this cannot be. Many of the important cases upholding accommodations of religion — including the unanimous decision of this court in *Amos* — were decided after the *Lemon* test was instituted in 1971. Therefore, *Lemon*'s nonestablishment test could hardly condemn religious accommodation. With regard to *Lemon*'s secular purpose requirement, it is well-established that protecting explicitly religious exercise is indeed a perfectly respectable secular purpose. Accommodations of religious exercise necessarily take religion specifically into account. This does not mean, however, that they work an unconstitutional establishment of

religion. Accommodations do not promote any favored religious exercise by the government, but rather allow individuals and groups to exercise sincerely held convictions without government interference. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to [violate the Establishment Clause], it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

The many accommodations upheld by this Court as constitutionally valid are conscious of religion, respectful of it, and even deferential to it. In each case, accommodation is distinguishable from establishment of religion because the government merely steps out of the way of religious exercise: it does not coerce, lead, or even suggest any religious practice or conviction. This crucial difference makes cases of accommodation easily distinguishable from cases of impermissible establishment.

The City further faults RFRA because its protection of religious exercise is not "narrowly tailored . . . [as] contemplated by the Court in *Smith*." Pet. Br. at 47. Again, the City cites no law other than the "contemplations" of the *Smith* majority to support this allegedly fatal constitutional defect. Furthermore, far from being a defect, RFRA's generality promotes equal treatment for all religious exercise claims. While the specific religious exemptions this Court has granted in the past remain perfectly constitutional, none of this Court's holdings prevent Congress or the States from neutrally granting such exemptions to all religions. Indeed, RFRA's general accommodation of religious practices ensures neutrality so that all claims for religious accommodation will receive equal respect from the government. *See, e.g., Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Goldman v. Weinberger*, 475 U.S. 503, 512 (1986) (Stevens, J., concurring) (emphasizing the constitutional principle of advancing "uniform treatment for the members of all religious faiths").

As to the second prong of *Lemon*, the City claims that RFRA fails the "neutral effect" test because its "sheer breadth and substantive strength . . . necessarily 'advance' religion." Pet. Br. at 47. Again, RFRA pales in strength beside the weight of this Court's accommodation precedents and beside the Free Exercise command in the Constitution itself. On *Lemon*'s third, "entanglement" prong, the City argues that RFRA entangles "every government . . . [that] must investigate whether [a] law will be the means of accomplishing its goal that is the least restrictive of every religion's requirements" — something that will entail "extensive investigation into the theological requirements of every relevant religion." Pet. Br. at 48. Petitioner paints a daunting picture of the research RFRA would require, but the demands on government bodies will be no different from the demands pre-*Smith*. The strict scrutiny inquiry has not proven to be overwhelming in the past. Those with legitimate claims for religious exemptions will doubtless do the legwork and bring their "theological requirements" to the attention of the relevant authorities. And even if RFRA does entail a bit of extra work, it hardly amounts to a constitutional violation but is rather the price that Congress, as the representative legislative body in this country, has decided is appropriate to accommodate the demands of a religiously pluralistic society. If that society later decides RFRA is too burdensome, it can demand change from Congress.

Finally, the City of Boerne claims that RFRA runs afoul of the Establishment Clause test in *Lee v. Weisman*, 505 U.S. 577 (1992), which prohibits government from endorsing the message of a particular religion. *Id.* at 587. The City maintains that RFRA "endorses a global message: the government likes religion" and that this endorsement "violates the fundamental constitutional requirement of neutrality on issues of conscience." Pet. Br. at 48. Again, RFRA epitomizes neutrality: it does not play favorites among those seeking accommodations. Thus, it is every bit as compatible with the Establishment Clause as are the myriad religious

accommodations long upheld by this Court. The City articulates no standard under which these discrete accommodations are constitutionally acceptable, but RFRA's across-the-board accommodation is not. Therefore, all its Establishment Clause objections would condemn equally every specific accommodation ever granted or allowed by this Court.

The constitutionality of accommodating religious exercise is well settled. RFRA does nothing more.

CONCLUSION

This Court should hold that the Religious Freedom Restoration Act does not violate the Establishment Clause.

Respectfully submitted,

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January 10, 1997

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 95-2074

(29)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF U.S. SENATORS ORRIN G. HATCH, STROM THURMOND, CHARLES E. GRASSLEY, ALFONSE M. D'AMATO, ROBERT F. BENNETT, JAMES M. INHOFE, AND RICK SANTORUM, AND REPRESENTATIVES JAMES V. HANSEN AND CHRISTOPHER CANNON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, to the extent it applies to the States, is a constitutional exercise of Congress' power under the Fourteenth Amendment.

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INTEREST OF *AMICI CURIAE*

Amici are United States Senators and Representatives who seek to preserve and protect *both* of the fundamental constitutional and political values at issue in this case: religious freedom and federalism. Some of these *amici* were sponsors of the Religious Freedom Restoration Act. That Act was expressly designed to "enforce" the Free Exercise Clause of the First Amendment (as incorporated by the Fourteenth) by creating a limited, statutory protection for religious freedom. That statute is within Congress' power under the plain meaning of Section 5 of the Fourteenth Amendment, and therefore does not depend for its validity upon the sweeping (and incorrect) view of congressional authority suggested by portions of the majority opinion in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

The purposes of this brief are to explain why the Act does not transgress the constitutional separation of powers; why the enactment of RFRA is within Congress' authority under an appropriately narrow reading of Section 5; and why the Court should reject the broader theories of congressional power that some might invoke in an effort to sustain the Act.[1]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Religious Freedom Restoration Act ("RFRA" or "the Act") is a proper and facially valid exercise of Congress' legislative power. First, contrary to petitioner's mischaracterization, the statute does not run afoul of the constitutional separation of powers by dictating the standard courts must apply in determining whether government action violates the Free Exercise Clause. Both the Senate and the House reports on RFRA make clear that Congress was merely

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[1] Pursuant to Rule 37 of this Court's Rules, the parties have consented to the filing of this brief in letters that have been filed with the Clerk.

"creat[ing] a new *statutory* prohibition," and that the Act "does not purport to set the standard of review to be applied by the . . . courts in cases brought under [any] constitutional provision." S. Rep. No. 103-111, at 14 n.43 (1993) (hereinafter "S. Rep."), *reprinted in* 1993 U.S.C.C.A.N. 1892; see also H.R. Rep. No. 103-88, at 6-7 (1993) (hereinafter "H.R. Rep."). RFRA also does not transgress any of the limitations on Congress' power articulated by this Court in *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995).

Second, the Act is a valid exercise of Congress' power, under Section 5 of the Fourteenth Amendment, to "enforce" the "provisions" of that Amendment through "appropriate legislation." U.S. Const. amend. XIV, § 5. To be sure, petitioner and its *amici* are correct that this power is limited, and cannot properly be construed as broadly as suggested in the alternative holding in *Katzenbach* v. *Morgan*. However, that power also is not so narrow as to be essentially redundant of the judiciary's own (implied) power to enforce the Fourteenth Amendment, *i.e.*, a mechanism by which to apply the Amendment's prohibitions in individual cases. In 1866, the word "enforce," particularly when applied to actions of the legislative branch, meant to "strengthen" or "fortify," not only to "effectuate" or "carry out."

The key to understanding the scope of Congress' power under Section 5 is to recognize that the word "appropriate," as applied to legislation, was a well-established term of art in 1866. See, *e.g.*, *Molzof* v. *United States*, 502 U.S. 301 (1992) (term of art to be construed in accord with its established meaning). As defined by Chief Justice Marshall in *McCulloch* v. *Maryland*, 17 U.S. 316 (1819), an "appropriate" legislative means is one which is "plainly adapted" to further a legitimate end that is "within the scope of the Constitution"; which "directly and necessarily tends" to produce that result; and which is not otherwise "prohibited" by the Constitu-

tion. Id. at 421; accord *Ex Parte Virginia*, 100 U.S. 339 (1879) (similar definition).

RFRA satisfies these requirements. Contrary to petitioner's argument, RFRA is not "prohibited" by the Establishment Clause, for reasons explained at length in briefs filed by the respondents. And the end RFRA seeks to promote—protecting the right to free exercise of religion—is obviously "within the Constitution." That right is expressly enshrined in the First Amendment, which has been applied to the States through the Fourteenth Amendment (in accordance with the understanding of those who framed the Fourteenth Amendment). Accordingly, RFRA does not depend for its validity upon *Morgan's* incorrect suggestion that Congress has discretion, not only to select the means to be used in enforcing a requirement imposed by the Fourteenth Amendment, but also to determine for itself what requirements that Amendment imposes. To recognize such a sweeping power would be to give Congress the power, in essence, to amend the Constitution without going through the process specified in Article V.

Further, the means chosen in RFRA for enforcing the Free Exercise Clause are "appropriate" within the meaning of Section 5, assuming (as we do) that this Court correctly identified the outer bounds of that Clause in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990). To be sure, RFRA goes beyond what the Free Exercise Clause requires of its own force (as interpreted in *Smith*). But RFRA is no different in that regard than the statutes at issue in such decisions as *Ex Parte Virginia*, 100 U.S. 339 (1879); *City of Rome* v. *United States*, 446 U.S. 156 (1980); and *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), all of which were upheld by this Court even though they went somewhat beyond the minimum that (arguably) would have been necessary to compel compliance with the relevant constitutional prohibitions. Again, on this crucial issue, the test is not whether RFRA

is indispensably necessary to the achievement of its goal, but whether the statute is "plainly adapted" to protecting the constitutional right to free exercise of religion, and "directly tends" to produce that result.

RFRA amply satisfies this requirement. *Smith* itself recognized that the Free Exercise Clause prohibits the enforcement of State laws that, surreptitiously or otherwise, "punish the expression of religious doctrines [the government] believes to be false, . . . impose special disabilities on the basis of religious views or religious status," or that regulate or ban "physical acts or abstentions . . . only because of the religious belief that they display." 494 U.S. at 877. By potentially requiring governments to justify, under a "compelling interest" test, the application of any challenged law that imposes a substantial burden on religious exercise, RFRA directly and substantially deters governments from violating these prohibitions. This Court's decisions upholding statutes in other contexts, moreover, demonstrate that this test is an especially effective and proven device for remedying government action that *surreptitiously* violates such prohibitions through seemingly "neutral" laws. In short, RFRA is a facially valid exercise of Congress' Section 5 power.

ARGUMENT

The Religious Freedom Restoration Act is based upon one of the core values underlying the Bill of Rights, namely that "the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." S. Rep. at 4. Indeed, Congress enacted RFRA as a means of enforcing the express constitutional guarantee of free exercise of religion. Id. at 14 n.43. To accomplish that end, Congress designed RFRA as a 'statutory prohibition on governmental action that substantially burdens the free exercise of religion" (id.) unless that action is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1(b). As we now demon-

strate, RFRA does not violate the separation of powers, and otherwise falls comfortably within Congress' authority under Section 5 of the Fourteenth Amendment.

I. THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS.

The rhetorical core of petitioner's argument is that it was the *Smith* decision that prompted Congress to pass RFRA, and that certain legislators (as well as the President) loosely—and incorrectly—described the statute as "overturning" or "reversing" that decision. But these facts do not make RFRA unusual, or in any way establish a violation of the separation of powers doctrine.

Congress often enacts legislation in response to decisions of this Court interpreting the Constitution, and sometimes in ways that are characterized as "overturning" those decisions. Yet RFRA is not an attempt to reinterpret the Free Exercise Clause of the Constitution any more than these other statutes represent reinterpretations of the Constitution. This was clearly recognized by Rep. Henry Hyde, a sponsor of the Act who at one point characterized the statute as "overturning" *Smith,* but then clarified that comment as follows:

> Of course, the label restoration is inappropriate in this context since the Congress writes laws—it does not and cannot overrule the Supreme Court's interpretation of the Constitution. We are unable to restore a prior interpretation of the first amendment.

139 Cong. Rec. H2357-58 (daily ed. May 11, 1993). And any suggestion that Congress was attempting to supplant this Court as the arbiter of constitutional interpretation is unambiguously refuted by the Senate report, which states:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard

> of review to be applied by the . . . courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition . . . ."

S. Rep. at 14 n.43.[2]

The Act also does not transgress any of the relevant limitations on Congress' Article I power articulated in *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995), or elsewhere. First, while *Plaut* made clear that Congress cannot pass statutes that prescribe the " 'rules of decision' " in pending cases, id at 1452 (quoting *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872)), the opinion also observed that Congress is permitted to " 'amend[] applicable law,' " id. at 1452-53 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). That is all RFRA does. It does not prescribe the holding for any case pending before the courts. It does not compel particular findings of facts or specific results under preexisting law. See *Robertson*, 503 U.S. at 441. It also does not force the courts to decide future cases using a congressional interpretation of the First Amendment. RFRA simply makes new statutory law designed to enforce the Free Exercise Clause.

Second, *Plaut* also makes clear that Congress cannot reopen final decisions of Article III courts. 115 S. Ct. at 1453, 1454 n.4. RFRA does not attempt to change the result reached by this Court in the particular dispute at issue in *Smith*. Nor does RFRA direct the lower courts to reopen final decisions based on that decision. If Congress had done such a thing, it undoubtedly would have been unconstitutional: "A legislature, without exceeding its

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[2] It is also of no moment that the Act depends for its application on a burden on the "exercise of religion under the First Amendment to the Constitution." *Cf.* Pet. Br. at 20. Many statutory rights are triggered by a burden upon or violation of a constitutional right. *E.g.*, 42 U.S.C. §§ 1981, 1983. But no court decision of which we are aware has ever held that such a statute is unconstitutional for that reason.

province, cannot reverse a determination once made in a particular case." *The Federalist* No. 81, at 484 (Hamilton) (Rossiter ed., 1961). Nevertheless, the legislature "may prescribe a new [statutory] rule for future cases." Id. Once again, that is all Congress has done here.

II. RFRA IS AN APPROPRIATE EXERCISE OF THE NARROW LAWMAKING POWER GIVEN TO CONGRESS BY SECTION 5 OF THE FOURTEENTH AMENDMENT.

Having shown that RFRA does not contravene the constitutional separation of powers, we now demonstrate that the statute is within Congress' power under Section 5 of the Fourteenth Amendment. That section provides that Congress "shall have power to enforce, by appropriate legislation," the Amendment's provisions. U.S. Const. amend. XIV, § 5. Section 1, in turn, forbids the States to "abridge the privileges or immunities of citizens of the United States," to "deprive any person of life, liberty, or property without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws." Id., § 1. The fundamental questions raised by this aspect of the case are (1) whether, as petitioner and certain of its *amici* appear to contend, this power to "enforce" the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment is limited to that which is indispensably necessary to compel compliance with those guarantees and, if not. (2) what are the limits to this enforcement power? Once these two questions are answered, the specific issue here—whether RFRA falls within the Section 5 power—is easily resolved in RFRA's favor.

A. Although It Imposes Significant Limitations, Section 5 Gives Congress The Authority, Not Only To Compel States To Respect Legitimate Fourteenth Amendment Rights, But Also To Strengthen And Fortify Those Rights Under A Traditional "Appropriateness" Test.

We agree with petitioner and some of its *amici* that the power given to Congress under Section 5 includes significant limitations. See *infra* pp. 20-24. However, that power is not so narrow as to duplicate essentially the judiciary's implicit power to enforce the Fourteenth Amendment by applying its prohibitions in particular cases. Thus, Section 5 undoubtedly gives Congress authority to go beyond that which is minimally necessary to compel the States to comply with the requirements of Section 1, whether or not there has been an antecedent violation of those requirements. *Cf.* Pet. Br. at 26-27; Ohio, *et al.*, *Amicus* Br. at 12-14.

1. This is confirmed by three separate features of the constitutional language. *First*, like Section 2 of the Thirteenth Amendment, Section 5 uses the term "enforce," which is broader than alternatives the drafters could have chosen, such as "execute" or "compel compliance with." At the time Section 5 was drafted, the dictionary definition of "enforce" included not only "execute" and "put in force," but also "strengthen." Webster, *An American Dictionary of the English Language* 447 (1866); accord Johnson, *A Dictionary of the English Language* (12th ed. 1812) (defining enforce as, *inter alia*, "[t]o give strength to; to strengthen; to invigorate"). There is no indication that the Framers of the Fourteenth Amendment intended to limit or depart from this then-common understanding of the term "enforce." See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) ("we construe a statutory term in accordance with its ordinary or natural meaning").

Second, this power to "enforce" is granted specifically to Congress, not to the judicial branch, the executive branch, or even some combination of the three branches.

Obviously, Congress' business is to draft and adopt legislation, not to decide "cases or controversies" (U.S. Const. art. III, § 2) or to "execute" the laws (U.S. Const. art. II, § 3), functions textually committed to the two other coequal branches of government. Accordingly, Congress could hardly be expected to "enforce" a law in the relatively narrow way that the Attorney General would enforce it in exercising her prosecutorial power, much less in the even narrower way that a court would be expected to enforce the requirements of the Amendment in a particular case.

Third, Congress was given power to enforce the Amendment through "appropriate legislation." While this phrase may sound imprecise to modern ears, in 1866 it was a term of art, one that would have evoked the early debates over the scope of Congress' implied powers (and Article I's Necessary and Proper Clause) and Chief Justice Marshall's resolution of that issue in *McCulloch.* Because "appropriate" was a term of art in 1866, it should be interpreted as it would have been understood at that time. See, *e.g., Molzof* v. *United States,* 502 U.S. 301 (1992) (citing other cases); *McDermott Int'l, Inc.* v. *Wilander,* 498 U.S. 337 (1991) (same).

As a term of art, the phase "appropriate legislation" had its genesis in the debate over Congress' implied powers, which began almost as soon as the Constitution was drafted and submitted to the States for ratification. *E.g., An Old Whig, No. 2* (1787), in 3 *The Complete Anti-Federalist* (Storing ed., 1981), reprinted in 3 *The Founder's Constitution* 239 (Kurland & Lerner eds., 1987); *The Federalist* No. 33, at 201-03 (Hamilton) (Rossiter ed., 1961); id. No. 44, at 283-86 (Madison). That debate became acute during the 1790-91 dispute between Thomas Jefferson, who was then Secretary of State, and Alexander Hamilton, the Secretary of the Treasury, over the constitutionality of legislation creating the first Bank of the United States. Jefferson argued that Congress possesses only those implied powers without which the gov-

ernment would be unable to carry out a particular function. 19 *The Papers of Thomas Jefferson* 270-80 (Boyd *et al.* eds., 1950), reprinted in 3 *The Founder's Constitution* 245-47. Hamilton, on the other hand, contended that Congress, in seeking to carry out its enumerated powers, possessed the implied power to use any means that "has a natural relation to any of the acknowledged objects or lawful ends of the government." 8 *The Papers of Alexander Hamilton* 97-106 (Syrett *et al.* eds., 1979), reprinted in 3 *The Founder's Constitution* 247-50. Thus, at its core, the debate turned on whether Congress had authority to adopt means that were "needful, incidental, useful, or conducive to" an express power, or only those means that were "absolutely or indispensably necessary" to the exercise of those powers. Id.

In *McCulloch*, this Court unanimously upheld Congress' power to charter a second Bank of the United States and, in so doing, rejected Jefferson's position on Congress' implied powers. The narrow issue was whether Congress had the implied power to create a corporation to carry out the Nation's business, inasmuch as the power to create corporations was not expressly granted by the Constitution. As framed by Chief Justice Marshall, the resolution of this issue depended upon whether, as the State of Maryland argued (echoing Jefferson), Congress had implied authority to do only that which was "indispensably necessary" to carry out one of its express powers, or whether, as Marshall put it, Congress had the power to choose an "appropriate means" (17 U.S. at 408, 410) to accomplish its goal, whether or not the chosen means was "indispensable" to the achievement of that goal.

To answer this question, Marshall reasoned that "[i]t must have been the intention of those who gave these [express] powers, to insure, as far as human prudence could insure, their beneficial execution." Id. at 415. "This could not be done," he opined, "by confining the choice of means to such narrow limits as not to leave it

in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." Id. Marshall further reasoned that, in practice, Jefferson's position would create separation-of-powers problems: "[W]here the law is . . . really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." Id. at 423.

Based upon this reasoning, Marshall resolved the underlying issue in the following famous passage: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." Id. at 421. The Court also held that the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18) could not be construed as a further restriction on Congress' implied powers and, therefore, effectively held that the legitimacy of legislation under that Clause was subject to the same "appropriateness" test. Id. at 420-21.[3]

Though the opinion went out of its way to emphasize that Congress' implied power is subject to strict limits,[4] *McCulloch* ignited a firestorm of protest. This was especially true in Marshall's home state, Virginia, where his statements regarding Congress' power to enact "appropriate" legislation quickly became a lightning rod. The *Richmond Enquirer*, "the preeminent keeper of the states'

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[3] As Professor Black has pointed out, "Marshall does not place principal reliance on [the Necessary and Proper Clause] as a ground of decision; . . . he addresses himself to the necessary and proper clause only in response to counsel's arguing its *restrictive* force . : . ." Black, *Structure and Relationship in Constitutional Law* 14 (1969).

[4] For example Marshall warned that the Court would hold an act unconstitutional if Congress, "under the pretext of executing its powers, pass laws for the accomplishment of objects, not intrusted to the government." *McCulloch*, 17 U.S. at 423.

rights flame," began publishing a series of attacks on the decision within a month of its issuance. Gunther, *John Marshall's Defense of McCulloch v. Maryland* 1 (1969) (hereinafter "*Marshall's Defense*"). Some of those attacks were written by a man calling himself Amphictyon and believed to be a Virginia state judge, William Brockenbrough. He argued that under Marshall's view of what constituted "appropriate" legislation, "there is no limitation whatever" to congressional authority, which, he claimed, could well be used to prevent the States from doing such things as imposing land taxes. Id. at 66-67. Spencer Roane, a judge of the Virginia Supreme Court of Appeals, made similar arguments in a subsequent series of letters published in the same paper, under the name Hampden. Like Brockenbrough, Roane specifically criticized *McCulloch*'s authorization of "appropriate" legislation. Id. at 128, 135.

In a series of essays responding to Brockenbrough and Roane, Marshall defended *McCulloch* against the charge (among others) that the authority to pass "appropriate" legislation gave Congress unlimited power. For example, responding to the hypothetical posed by Judge Brockenbrough, he flatly denied "that a law prohibiting the state legislatures from imposing a land tax would be an 'appropriate' means . . . to be employed in collecting the tax of the United States." *Marshall's Defense* at 100. According to Marshall, the adoption of such an extreme measure would not be "plainly adapted" to the end of collecting federal taxes, but instead would indicate that Congress, " 'under the pretext of executing its powers,' " was really acting " 'for the accomplishment of objects not intrusted to the [federal] government.' " Id. (quoting *McCulloch*, 17 U.S. at 423). Moreover, relying upon contemporaneous dictionary definitions of the word "appropriate," he went on to explain that "means which are 'appropriate' . . . must 'directly and necessarily tend to

produce' " the end in question. Id. at 102; see also id. at 186, 189 (discussing meaning of "appropriate").[5]

During the ensuing 40 years, Marshall's "appropriateness" test for determining the existence of an implied congressional power—and for construing the Necessary and Proper Clause—was quoted and discussed in numerous legal commentaries. *E.g.*, 1 Story, *Commentaries on the Constitution* § 432, at 417 (1833); *New York* v. *Commissioners*, 67 U.S. 620 (1862).[6] Often his formulation, and his view of implied powers generally, were roundly criticized, especially by the most ardent state-rights advocates. *E.g.*, Niles Weekly Register, March 13, 1819, at 41-44, *reprinted in Great Lives Observed: John Marshall* 104-07 (Kutler ed., 1972)

Thus, by the time the Fourteenth Amendment was drafted and ratified in 1868, the phrase "appropriate legislation" had a well defined meaning: It referred to any legislation that would pass muster under the standard articulated in *McCulloch*. As discussed in more detail

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[5] In a later essay, Marshall warned that Congress' discretion to select "appropriate" legislation may not be "fraudulently used to the destruction of the fair land marks of the constitution. Congress certainly may not, under the pretext of collecting taxes, or of guaranteeing to each state a republican form of Government, alter the law of descents; but if the means have a plain relation to the end—if they be direct, natural and appropriate, who, but the people at the elections, shall, under the pretext of their being unnecessary, control the legislative will, and direct its understanding?" *Marshall's Defense* at 173.

[6] Later, the *McCulloch* standard came to be equated with "rationality" review, *E.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 488 (1955). However, as shown in the text, Marshall's own approach was considerably stricter than this. *See supra* pp. 10-11. There is substantial historical evidence, moreover, that the Necessary and Proper Clause has more restrictive force than is generally thought today. *See* Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267 (1993).

below, that formulation placed substantial limits on congressional authority. However, because the *McCulloch* standard allows Congress to go somewhat *beyond* what is "indispensably necessary" to carry out an enumerated power or to pursue a constitutionally legitimate objective, the drafters (and ratifiers) of the Fourteenth Amendment plainly could not have meant to limit Congress' legislative options to those that were indispensably necessary to compel compliance with the requirements of that Amendment.

2. Section 5's history compels the same conclusion. On January 22, 1866, a special subcommittee of the Joint Committee on Reconstruction was established to draft what was to become the Fourteenth Amendment. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 37-38, 55-56 (1969). The Joint Committee considered several variations of what would become Section 5. Among them was the following proposal by Representative John A. Bingham, which the Joint Committee approved:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).

Id. at 61. Bingham presented the proposed amendment in the House on February 26, 1866. Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1866). Both proponents and opponents of the Amendment believed it gave substantial lawmaking power to the Congress at the expense of the States. *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1063-65 (1866) (statements of Sen. Hale); id. at 1082 (statement of Sen. Stewart); id. at 1095 (statement of Rep. Hotchkiss); id. at app. 133-35 (statement of Rep. Rogers). However, the principal attack on Bingham's proposal centered, not on the power it would give Congress to regulate state action, but on the fact that the proposal would give

Congress an unusually broad power to regulate private conduct, *i.e.*, it would give Congress authority to "pass uniform legislation in areas traditionally left to the states, such as marriage, property, and definition of crimes." Curtis, *No State Shall Abridge* 69 (1986). Accordingly, as Senator Stewart put it, the proposed amendment would "obviate the necessity of any more State legislatures" by giving Congress what amounted to a general police power. Id. at 70.

Because of this controversy, Congress postponed consideration of the proposed amendment. The Joint Committee then set about redrafting the amendment in late April. Kendrick, *supra*, at 83-115. On April 30, 1866, the Committee reported to Congress the text of what later became the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 2265, 2286 (1866). Section 5 of that proposal granted enforcement power to Congress, while Section 1 created disabilities on state action, thereby emphasizing that those disabilities are freestanding and do not require affirmative support by Congress. Curtis, *supra*, at 85. The revised article of amendment, moreover, was narrower than the original proposal, in that it reached *only* state action, not private action. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Evans); id. at 2765 (statement of Sen. Howard); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989). Accordingly, this version did not evoke the broad concern over possible congressional power to prescribe nationally uniform laws with respect to life, liberty, and property. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. app. 151 (1871) (statement of Rep. Garfield).

Section 5 also contained a different formulation of the scope of Congress' discretion to select the means it could use in carrying out the ends authorized by other sections of the Amendment. However, this difference was not significant. Bingham's original proposal had simply borrowed the phrase "necessary and proper" from Article

I, which *McCulloch* had interpreted as allowing Congress the power, not only to choose those means that are indispensable to carrying out one of the enumerated powers, but means that are "appropriate" to that end. See *supra* p. 11. Thus, there was no substantive difference between the "necessary and proper" formulation in Bingham's original proposal, and the "appropriate legislation" requirement of what became Section 5.

This fact—as well as the fact that "appropriate" was by then a term of art—is confirmed in subsequent remarks by Senator Thurman:

> What is meant by this term "appropriate legislation?" We know where the term comes from. We know it comes from an old opinion of Chief Justice Marshall, and was applied by him simply to the old provision of the Constitution that Congress has power to make all laws necessary and proper for carrying into effect the foregoing powers.

Cong. Globe, 41st Cong., 2d Sess. 602 (1870).

In short, both the language and history of Section 5 demonstrate that it gives Congress the power to adopt means that would be considered "appropriate" under the *McCulloch* standard, so long as the end being pursued falls within one of the Amendment's sections, and so long as the means chosen are directed at state action and do not violate some other constitutional restriction on Congress' power. Congress' discretion, although limited, was thus not restricted to those means that might be thought indispensably necessary to carry out a constitutional objective.

3. This conclusion is further confirmed by this Court's decisions interpreting Section 5 and similar provisions in the Thirteenth, Fifteenth, and Eighteenth Amendments. The seminal exposition of Section 5's requirements was provided in *Ex parte Virginia,* which held that the provisions of the Civil Rights Act of 1875 forbidding the exclusion of jurors on account of their race were within

Congress's power under Section 5 to enforce Section 1's "equal protection" guarantee:

> Whatever legislation is *appropriate*, that is, *adapted* to carry out the objects the amendments have in view, whatever *tends* to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

100 U.S. at 345-46 (emphasis added). Although the Court did not cite *McCulloch*, the language it used in explicating the term "appropriate" is obviously reminiscent of Marshall's definition of an "appropriate" means, *i.e.*, one that is "plainly adapted" to a constitutionally legitimate end, one which "directly and necessarily tends to produce" that end, and is not otherwise prohibited. See *supra* pp. 10-11; see also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966) (recognizing that *Ex Parte Virginia's* definition of "appropriate" is functionally identical to Marshall's). The similarities between the formulations are simply too striking to have occurred by accident. Thus, in its earliest interpretation of the operative phrase in Section 5, this Court implicitly recognized that this phrase was a term of art, and gave it the same well established meaning it had had ever since *McCulloch*.

Not surprisingly, the Court has upheld a variety of statutes that, although they "tend[ed] to enforce submission to the prohibitions" of the Fourteenth Amendment, were not "indispensably necessary" to that end. *Ex Parte Virginia* itself is a prime example. There, the Court held (1) that the right to a trial "by jurors indifferently selected or chosen without discrimination . . . because of their color" was an aspect of the right granted by Section 1 to "equal protection of the laws" (100 U.S. at 345), and (2) in pursuit of this constitutionally proper end, it was within Congress' power under Section 5 to prescribe criminal penalties, including imprisonment, for any State official, including a State judge who (as was alleged in that

case) excluded a juror on account of his race (id. at 345-48).

The dissent objected, in part, to the breadth of the means chosen by Congress to achieve the goal of preventing race-based exclusions, namely, the "exercise [of] coercive authority over judicial officers of the States in the discharge of their duties under State laws." Id. at 358 (Field, J., dissenting). The majority itself, moreover, alluded to an arguably narrower or less intrusive means by which Congress could have achieved its goal—simply "declar[ing] void any action of a State in violation of the prohibition." Id. at 345. Yet the Court nevertheless upheld Congress' chosen mechanism under Section 5 because, as noted above, it was "adapted to carry out" an end the Court found to be within Section 1, and "tend[ed] to enforce submission to the prohibitions" of that Section.

Respondent Flores' brief presents an excellent analysis of this Court's subsequent decisions construing Section 5, as well as identical provisions in the Thirteenth, Fifteenth, and Eighteenth Amendments. Without duplicating that analysis here, we note two conclusions that must emerge from any honest evaluation of those decisions.

First, in accordance with the standard articulated in *Ex Parte Virginia,* this Court has consistently and frequently upheld, as "appropriate legislation" under each of those Amendments, laws that went at least somewhat beyond what would have been indispensably necessary to effectuate the end specified in the Constitution. This is true whether the end sought to be served by the legislation was, for example, preventing the states from abridging voting rights based on race (*e.g., South Carolina* v. *Katzenbach; Oregon* v. *Mitchell,* 400 U.S. 112 (1971); *City of Rome* v. *United States,* 446 U.S. 156, 172-83 (1980); preventing the states from discriminating on the basis of sex in employment (*e.g., Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976)); or preventing the sale of intoxicating beverages during Prohibition (*e.g., National Prohibition Cases,* 253 U.S. 350, 387-88 (1920)). In at least two

such cases, moreover, this Court held that Congress has the power to adopt means under Section 5 which the Court had previously (or simultaneously) held were *not* indispensably necessary to the pursuit or achievement of the end that Congress sought to achieve. See *South Carolina* v. *Katzenbach* (upholding congressional ban on literacy tests even though the Court had previously held that literacy tests do not necessarily violate the Fifteenth Amendment); *City of Rome* (upholding law requiring preclearance of changes in voting practices with potentially discriminatory effects, even though the Court held the same day that electoral practices with discriminatory effects only do not violate the Constitution absent proof of discriminatory intent).

Second, these decisions by and large did not rest (and need not have rested) upon the broad conception of congressional power described in *Katzenbach* v. *Morgan.* There, the Court suggested (as part of an alternative holding) that Congress has discretion under Section 5, not only to choose the most appropriate means to pursue a particular end, but also to choose the end itself by adopting an expansive interpretation of a constitutional right. 384 U.S. at 652 (Congress can appropriately conclude that literacy tests themselves violate the Equal Protection Clause, even though the Supreme Court had previously held that such tests were not a violation of the Clause). Joined by Justice Stewart, Justice Harlan correctly objected to this reasoning as "[i]n effect . . . giving Congress the power to define the substantive scope of the [Fourteenth] Amendment." Id. at 668 (Harlan, J., dissenting). Notably, none of the Court's earlier (and later) decisions sustaining legislation under Section 5 relied upon any such sweeping power.

Instead, as shown below, those decisions have respected an important limitation upon Congress' exercise of the Section 5 power, namely, that the end Congress seeks to achieve in exercising that power be supplied, not by Congress itself, but by the Constitution. It is to the propriety of that restriction—and others—that we now turn.

B. Section 5 Does Not Authorize Congress To Attempt To Protect Rights Not Plainly Encompassed Within The Fourteenth Amendment; Adopt Remedies With An Insufficient Nexus To A Right Legitimately Protected By That Amendment; Regulate Purely Private Conduct; Trench Upon State Prerogatives Absent A Clearly Expressed Intent; Or Violate Other Provisions Of The Constitution.

Congress' Section 5 authority carries with it at least five internal limitations, all of which significantly restrict Congress' ability to intrude into the States' proper domain.

1. As already noted, and contrary to the suggestion in *Morgan*, Congress may not arrogate to itself the authority to determine the ends that it may pursue in the exercise of its Section 5 authority. Instead, its action must be directed at an end that fairly and legitimately falls within the text of the Fourteenth Amendment. This is so for several reasons.

First, by its very language, Section 5 gives Congress only the authority to "enforce" the guarantees of the Fourteenth Amendment, not to define their scope. And Congress is empowered to enforce only "the provisions" of that Amendment. This implies that, insofar as the Amendment gives rise to personal rights, Congress may enforce only those rights that fairly fall within the Amendment's text (including its incorporation of other express constitutional rights), not those derived—appropriately or not—from the Amendment's "penumbrae."[7] Moreover, given

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[7] Right or wrong, the notion that a provision of the Constitution can possess penumbrae that themselves give rise to enforceable rights is a product of the 20th Century. Accordingly, even if a prior judicial decision holds that a particular right, which does *not* fall fairly within the Fourteenth Amendment's text (or another constitutional provision incorporated by reference therein), nevertheless is protected under that Amendment, such a decision does not necessarily establish that Congress has authority under Section 5 to enact legislation in pursuit of that right. Thus, for example, the fact that this Court has recognized a qualified right to abortion in such decisions as *Roe* v. *Wade*, 410 U.S. 113 (1973), would not

the hostile congressional reaction to Rep. Bingham's original proposal (*supra* pp. 14-15), it is inconceivable that the Fourteenth Amendment would have passed Congress, much less have been ratified by the States, if it had allowed Congress either to define for itself the scope of the rights and disabilities created by the Amendment, or to "enforce" individual rights lacking a firm anchor in the Amendment's text.

Second, allowing Congress to "define the substantive scope" of the Amendment, as Justice Harlan put it in his *Morgan* dissent, would be contrary to the approach adopted in *McCulloch* and its progeny. *McCulloch* held that, to exercise an implied power, Congress must act in the service of an "end" that is "legitimate [and] within the scope of the constitution." 17 U.S. at 421. Similarly, *Ex Parte Virginia* treated the Amendment's "objects" and "prohibitions" as fixed, and not subject to enlargement by Congress. See 100 U.S. at 435-46. The same is true of this Court's other decisions construing Section 5, with the exception of *Morgan.*

2. The next limitation is the requirement that the legislation be "plainly adapted" to—and that it "directly and necessarily tend to produce"—the legitimate end at issue. As Chief Justice Marshall warned in *McCulloch,* a reviewing court can and should hold such legislation unconstitutional if it appears from the legislation itself that Congress "under the pretext of executing its powers, [has] pass[ed the] law[] for the accomplishment of ob-

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mean that Congress can use the Section 5 power to "enforce" that right.

In any event, even without overruling that decision (or others recognizing rights not firmly rooted in the text of the Constitution), this Court could well decline to extend its reasoning to the Section 5 context under ordinary principles of *stare decisis.* After all, overturning a decades-old Court decision could upset settled expectatons and reliance interests that simply do not attach to a newly enacted statute. *See, e.g., Planned Parenthood* v. *Casey,* 510 U.S. 1309 (1994) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing importance of reliance interests in decision to apply *stare decisis*).

jects not intrusted to the government." 17 U.S. at 423. As examples, Marshall cited hypothetical federal laws altering inheritance laws and denying to the States the power to impose a general land tax. See *supra* p. 12.

Such scrutiny does not mean, of course, that a court should engage in a wide-ranging inquiry into the motives of individual memebers of Congress, much less of Congress as a body. *Cf. United States* v. *Darby*, 312 U.S. 100, 115 (1941) (noting impropriety of such an inquiry); *United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968) (same). However, if the means selected are so unrelated to the asserted end as to suggest that the statute was passed in furtherance of an end that falls outside the Fourteenth Amendment, the statute should not be deemed "appropriate legislation."

3. Congress also may not invoke Section 5 to justify legislation that reaches beyond state action to purely private conduct. Like the other limitations discussed above, this limitation serves the interests of federalism because it prevents Congress, in the words of Senator Stewart, from "obviat[ing] the necessity of any more State Legislatures." See Cong. Globe, 39th Cong., 1st Sess., at 1082 (1866). As discussed above, it was to avoid precisely this result that Congress rejected Representative Bingham's original proposal, which did not include an express "state action" requirement. See *supra* pp. 14-15.

That the Fourteenth Amendment (other than Section 4 relating to war debts) does not reach purely private conduct is demonstrated by an examination of its text. The key provisions of Section 1, for example, are phrased as disabilities on the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." See *Croson*, 488 U.S. at 490 ("Section one of the Fourteenth Amendment is an explicit constraint on state power"). Thus, the individual rights that are implied by Section 1 are rights as against

the States, not rights as against private citizens in the absence of some connection to state action. Although some Justices have occasionally suggested otherwise in the past,[8] this Court has consistently upheld and enforced Section 5's state action requirement. *Civil Rights Cases*, 109 U.S. 3, 11-14 (1883); *James* v. *Bowman*, 190 U.S. 127 (1903); *United Bhd. of Carpenters* v. *Scott*, 463 U.S. 825, 831 (1983); accord *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 606 (1990) (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J.).

4. Next, given that Section 5 was enacted against the backdrop of the Eleventh Amendment, if Congress intends to abrogate the States' sovereign immunity it must clearly state its intent to do so. *Gregory* v. *Ashcroft*, 501 U.S. 452, 469 (1991) (" 'we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment' ") (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16 (1981)); see also *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).

5. Finally, Congress lacks the power under Section 5 to adopt legislation that is otherwise "prohibited" by the Constitution. *McCulloch*, 17 U.S. at 423. Thus, petitioner and its *amici* are correct that Congress cannot use Section 5 to enact legislation that violates the constitutional separation of powers, or provisions of the Bill of Rights such as the Establishment Clause of the First Amendment. Congress likewise may not legislate under Section 5 in a way that violates rights protected by the Fourteenth Amendment itself. As Justice O'Connor has noted, Section 5 "grants Congress no power to restrict,

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[8] *District of Columbia* v. *Carter*, 409 U.S. 418, 423 n.8 (1973) (*dictum*); *United States* v. *Guest*, 383 U.S. 745, 762 (1966) (Clark, Black, and Fortas, JJ.); *id.* at 781-84 (Brennan, J., Warren, C.J., and Douglas, J.).

abrogate, or dilute these guarantees." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982) (O'Connor, J.); accord *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097 (1995) (holding that Section 5 does not give Congress the authority to "enforce" the Equal Protection Clause in favor of some citizens in a manner that violates the equal protection rights of others).

C. RFRA Falls Within Congress' Narrow Section 5 Power, Without Transgressing Its Limitations.

With these limitations firmly in mind, we now turn to a consideration of whether RFRA, as applied to the States, falls within Congress' power under Section 5. By its terms, the statute applies only to governmental action, and therefore easily satisfies Section 5's state action requirement. See 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal and State law, and the implementation of that law . . . ."). RFRA also clearly states its intention to abrogate the states' sovereign immunity. And, for reasons persuasively explained in the respondents' briefs, RFRA does not run afoul of the Establishment Clause.

Accordingly, the statute's validity depends upon (1) whether the end it seeks to promote falls within the scope of the Fourteenth Amendment, and (2) whether the means it uses satisfy Section 5's "appropriate legislation" requirement. As we now show, RFRA satisfies both of these crucial requirements.

1. There can be no question that RFRA furthers a constitutionally legitimate "end," namely, protecting the right to free exercise of religion articulated in the First Amendment. In RFRA's subtitle, the Act is expressly denominated "[a]n Act to protect the free exercise of religion." Pub. L. No. 103-141, 107 Stat. 1488 (1993). Similarly, the Senate Report, in discussing Congress' authority to enact RFRA, states that "the act is clearly designed to implement the free exercise clause," and that it was "intended to enforce the right guaranteed by the

free exercise clause . . . ." S. Rep. at 14 & n.43. Thus, the only real issue with respect to the "end" Congress sought to pursue in enacting RFRA is whether the right to free exercise of religion is a right that Congress can legitimately act to "enforce" against the States under Section 5. It is.

Certainly, the right to free exercise of religion fairly falls within the text—*i.e.*, a "provision"—of Section 1. That right is one of the "liberties" expressly protected against congressional intrusion by the text of the First Amendment. Accordingly, as this Court has held in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), and its progeny, the right to free exercise of religion fits comfortably within Section 1's prohibition of state action that would "deprive [] [any person] of . . . liberty . . . without due process of law." *Id.* at 303; accord *Employment Div.* v. *Smith*, 494 U.S. 872, 876-77 (1990).[9]

The conclusion that the Fourteenth Amendment incorporates the Free Exercise Clause is confirmed by ample evidence that the drafters of Section 5 believed it would give Congress authority to enforce against the States the rights already guaranteed, as against congressional action, by the First Amendment. Senator Howard, who introduced the revised draft of the Fourteenth Amendment in the Senate, was most explicit on this point. Alluding to the existing lack of power on the part of Congress to enforce against the States the first eight Amendments to the Constitution, he stated: "[I]f they [the first eight Amendments] are to be effectuated and enforced, as they

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[9] On its face, the right to free exercise of religion fits even more comfortably within Section 1's prohibition on state action that would "abridge [a] "privilege[] or immunit[y] of citizens of the United States." U.S. Const. amend. XIV, § 1. The contrary conclusion in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), has been persuasively criticized on textual and historical grounds. See Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193 (1992).

assuredly ought to be, . . . additional power should be given to Congress to that end. This is done by the fifth section of this amendment." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). Similarly, Representative Bingham, who introduced the proposed amendment in the House, observed that Section 5 would "arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today." Id. at 1088; accord id. at 1072 (statement of Sen. Nye); id. at 1629 (statement of Rep. Hart). There were many statements to this same effect during the subsequent campaign for ratification by the State (see Curtis, *supra*, at 133-44 (collecting authorities)), and during subsequent Reconstruction Congresses. See Cong. Globe, 42d Cong., 1st Sess. app. 69 (1871) (statement of Rep. Shellabarger); id. at app. 84-85 (statement of Rep. Bingham). See also 2 Cong. Rec. app. 242 (1874) (statement of Sen. Norwood); id. at 384-85 (statement of Rep. Mills).[10]

2. The means adopted by RFRA for enforcing the Free Exercise Clause likewise satisfy Section 5's "appropriate legislation" requirement. As noted earlier, we assume that this Court's decision in *Smith* identified the outer bound-

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[10] That the Framers meant to give Congress the power to enforce the First Amendment (and other provisions of the Bill of Rights) against the States is hardly surprising in light of then-prevailing political considerations. Those considerations dictated that the goals of the Reconstruction Congresses with respect to the rights of former slaves, especially in the South, be wrapped in a broad and politically appealing agenda for securing the civil rights of all citizens, including a broad spectrum of individual liberties. James, *The Framing of the Fourteenth Amendment* 21-33 (1965). More specifically, as the brief for respondent Flores shows, the protection of religious liberty against the States was a central part of the Reconstruction agenda, owing to the fact that southern States had sometimes restricted religious meetings among slaves and deprived them of access to the Bible. *See* Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemption Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1131-37, 1145-49 (1994).

aries of the limitations imposed upon States directly by the Fourteenth Amendment's incorporation of that Clause. On that assumption, RFRA concededly goes beyond merely compelling the States to comply with those requirements. However, as shown above, that alone has never been a basis to hold that Congress has exceeded its authority, whether Congress acts under the Fourteenth Amendment (as in *Ex Parte Virginia*), one of the other Reconstruction Amendments (as in *City of Rome* and *South Carolina* v. *Katzenbach*), or one of the powers enumerated in Article I (as in *McCulloch*). Rather, assuming the legislation does not run afoul of some external constitutional limitation, the question is always whether, in Chief Justice Marshall's formulation, the legislation is "plainly adapted" to its end, and "directly and necessarily tends to produce" it. See *McCulloch*, 17 U.S. at 421.

RFRA satisfies this test. As construed in *Smith*, the Free Exercise Clause, of its own force, provides important protections against certain kinds of State action:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." . . . The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma.

494 U.S. at 877 (citations omitted). Under *Smith*, moreover, the Free Exercise Clause protects, in at least some circumstances, religiously motivated "performance of (or abstention from) physical acts." Id. As to those, *Smith* recognized that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or

abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." Id.; see also *Church of Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520 (1993) (applying this principle to invalidate local ordinance).[11]

Although RFRA adopted the "compelling interest" test that *Smith* held was not *mandated* by the Free Exercise Clause, Congress was well within its discretion in concluding that the adoption of this test was an "appropriate" means by which to enforce the requirements of that Clause. This is so for two reasons.

The first is deterrence. When it enacted RFRA, Congress had before it evidence that, without the constraint of the compelling interest test, governments could and sometimes would, in violation of those prohibitions recognized in *Smith*, deliberately discriminate against religious beliefs or practices under the cloak of a "neutral" or "generally applicable" law. See S. Rep. at 5 & n.3; H.R. Rep. at 2 & n.2. Witnesses testified that state legislators wishing to target a particular religion or a particular religious practice would "camouflage [their intention] in a law of general applicability." Religious Freedom Restoration Act of 1991: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102d Cong., 2d Sess. 105 (1992) (Statement of Nadine Strossen, President, National Board of Directors, ACLU). Indeed, that is essentially what this Court found that the local government in the *Hialeah* case had done, though somewhat ineptly. See 508 U.S. at 520. And in other contexts, this

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[11] *Smith*, on the other hand, held that the Free Exercise Clause does not, of its own force, (1) prevent governments from enacting generally applicable or "neutral" laws that incidentally burden religious exercise, or (2) require governments to justify such laws by showing that they are "narrowly tailored," in some sense, to the promotion of a "compelling government interest." 494 U.S. at 878-89.

Court has noted the risk of "subtle departures from neutrality" in the enactment or enforcement of state laws, *Gillette* v. *United States*, 401 U.S. 437, 452 (1971), and the distinct possibility of "covert suppression of particular religious beliefs," *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

Such suppression could of course operate to "punish the expression of religious doctrines [the government] believes to be false," "impose special disabilities on the basis of religious views or religious status," or even "ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display"—as the Court found in the *Hialeah* case. 508 U.S. at 521. Any of those government actions would violate the Free Exercise Clause as construed in *Smith*.

RFRA's compelling interest test is "plainly adapted" to discourage such unconstitutional government actions, and obviously "tends" to do so, as the *McCulloch* test requires. The mere possibility that government officials may be called upon, in a court of law, to justify their actions obviously deters violations of the Free Exercise Clause. Certainly, Congress was within in its discretion in so finding. See *supra* p. 28.

The second reason is remediation. Congress concluded that, absent a compelling interest test, those whose constitutional free exercise rights have been violated would nevertheless "be forced to convince courts that an inappropriate legislative motive" was behind the statute or regulation at issue. H.R. Rep. at 6. Proving such a motive is notoriously difficult and necessitates intrusive, and often embarrassing, discovery. Id. Moreover, the necessity of proving such a motive will often mean that many violations of the Free Exercise Clause (again, as interpreted in *Smith*) will go unremedied.

Once again, RFRA's compelling interest test directly addresses this problem. If a governmental body surrepti-

tiously "punish[es] the expression of religious doctrines [the government] believes to be false, . . . impose[s] special disabilities on the basis of religious views or religious status" or bans physical "acts or abstentions . . . only because of the religious belief that they display," *Smith*, 494 U.S. at 877, RFRA allows the aggrieved party a remedy without engaging in protracted and intrusive litigation over legislative motives. In this regard, RFRA is no different from many other statutes designed to enforce other rights protected by the Reconstruction Amendments, and sustained by this Court under Section 5 and analogous provisions. *E.g., Oregon* v. *Mitchell; South Carolina* v. *Katzenbach.*

Simply put, RFRA's compelling interest test directly encourages all governments—federal, state, and local—to respect and adhere to the core prohibitions of the Free Exercise Clause, and directly assists in remedying violations where they occur. No objective could be more legitimate, and no legislation more "appropriate" to that end.

CONCLUSION

For the foregoing reasons, these *amici* respectfully urge this Court to affirm the decision of the Court of Appeals, and to hold that the Religious Freedom Restoration Act, to the extent it applies to the States, is a facially constitutional exercise of Congress' authority under the Fourteenth Amendment.

Respectfully submitted,

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January 10, 1997

(30)

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 95-2074

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent.

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In light of free exercise problems faced by minority religions, does the Religious Freedom Restoration Act represent a legitimate exercise of Congress' power to enforce rights guaranteed by the Fourteenth Amendment through remedial legislation?

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BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS*

INTEREST OF THE AMICUS CURIAE

The Church of Jesus Christ of Latter-day Saints (often referred to as the "LDS Church" or "Mormon Church") is a Christian denomination with over 9,000,000 members worldwide. Slightly less than half the members of the Church reside in the United States. Because of continuing rapid growth, the Church has an active program for constructing temples, chapels, and various other structures that further the Church's religious mission. For this reason, the Church constantly encounters the kinds of land use issues at stake in the present case. While most government officials work with the Church in good faith, the pressures of hostility toward religion do sometimes operate behind the facade of ostensibly neutral land use regulations. In the aftermath of this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Religious Freedom Restoration Act ("RFRA") plays a vital role in assuring that land use regulations are administered in a manner that is consistent with genuine respect for religious freedom.

With the constitutionality of RFRA at stake, however, the Church's interest in the present case goes well beyond these important land use questions to the very core of its religious beliefs. The Church's 11th Article of Faith declares, "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." This tenet springs from an even deeper belief in the sanctity of conscience and the free agency of human beings. Like the framers of the federal

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* The parties have stipulated to their consent to the filing of this brief. The consent of the Intervenor the United States of America has been lodged with the Clerk.

Constitution, the LDS Church proclaims that the right to free exercise of religion is an inalienable right not dependent for its existence on the action of any secular sovereign—whether state or federal, domestic or foreign. In the words of James Madison, the free exercise right is inalienable because it reflects "a duty towards the Creator," which "is precedent both in order of time and degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments*, Paragraph 1 (1785), *reprinted in Appendix* to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947). The Church believes, as has been argued in other briefs, that the Constitution affords Congress adequate power to enact RFRA, and that RFRA is vital to protecting our inalienable first freedom from state and federal encroachments.

When the scope of First Amendment free exercise protections was narrowed by *Smith*, the Church felt profoundly threatened by the array of potential encroachments on religious freedom that this decision opened up, and accordingly joined the broad coalition of churches and other organizations that supported passage of RFRA in 1993 ("the Coalition"). We continue to support and actively participate in the ongoing efforts of the Coalition to defend RFRA against its detractors. Since the Church continues to support the efforts of the Coalition, including its brief in this case, there is no need for us to repeat the main arguments made there confirming that RFRA does not establish religion, that it does not violate separation of powers or federalism principles, and that Section 5 of the Fourteenth Amendment grants Congress sufficient power to enact RFRA. Rather, our aim is to emphasize the vital significance of RFRA for minority religious traditions such as ours, and to highlight the historical and contemporary considerations that warrant the Congressional remedy it provides. As Elder Dallin H. Oaks of the Quorum of the Twelve Apostles of the Church stated at the time of the Congressional hearings on RFRA,

the LDS Church is "looking to the larger good and using the experience of our faith in history as a motivation to lend our voice to the protection of smaller groups against future incursion on their freedom."[1]

SUMMARY OF ARGUMENT

The historical experience of the Church of Jesus Christ of Latter-day Saints underscores the importance of providing the kinds of protection for religious liberty that RFRA affords. Although the LDS Church is now the seventh largest denomination in the United States,[2] its experience outside of Utah has always been that of a minority religion. Some of the darkest pages of the history of religious persecution in America chronicle the treatment of Mormons, as they were driven in the nineteenth century from Ohio to Missouri to Illinois and finally to the valleys of the Rocky Mountains. While the Church believes "in obeying, honoring, and sustaining the law,"[3] it is also deeply conscious that laws and the officials who apply them sometimes operate in ways that violate religious freedom. Many of the landmarks of persecution in LDS history were carried out under the cloak of "neutral" and "general" laws. Not surprisingly, then, the Church has long believed that just government has a compelling interest in safeguarding religious freedom and making certain that when state encroachments on that value are permitted, they must be justified on the basis of "interests of the highest order and those not otherwise served." *Wisconsin*

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[1] *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 57 (1992).

[2] 1996 Yearbook of American and Canadian Churches, *quoted in* Salt Lake Trib., May 25, 1996.

[3] Church of Jesus Christ of Latter-day Saints, *Pearl of Great Price*, Article of Faith 12, at 61 (1981).

v. Yoder, 406 U.S. 205, 215 (1972). The Church's experience over the past 175 years has confirmed that the legitimate free exercise rights of a religious minority cannot be adequately protected or enforced without the functional equivalent of the compelling state interest/least restrictive alternative test that crystallized in this Court's free exercise jurisprudence in the decades before the decision of *Employment Division v. Smith*.

The historical religious persecution evidenced by LDS history is reemerging today, albeit in subtler forms that do not generally display the brutality of the past. Churches and individual believers face an ever-proliferating range of practical problems in the aftermath of *Smith*. Ranging from questions dealing with abortion and the beginning of life to questions of treatment of the dead, and touching on virtually every aspect of religious life in between, these practical problems have made the protections afforded by RFRA all the more significant.

One reason RFRA is so important is that there are structural biases in the modern regulatory state that systematically undervalue religious freedom rights. In fact, the comprehensive study of zoning cases collected in the Appendix shows that religious minorities have suffered disproportionately disadvantageous treatment as a result of these structural biases at the initial decision stage. Congress has authority to pass legislation to remedy the resulting systematic under-protection of free exercise values.

ARGUMENT

I. THE HISTORICAL EXPERIENCE OF THE MORMON CHURCH UNDERSCORES THE NEED FOR RFRA.

> We believe that rulers, states, and governments have a right, and are bound to enact laws for the protection of all citizens in the free exercise of their religious belief * * *.
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> -*Doctrine & Covenants* 134:7 (1981).

Much of the early history of the Mormon Church is a litany of persecution. Our aim here is not to bemoan this extensive history, but to identify a number of salient episodes that have forged the Church's conviction that RFRA's protections are vital to genuine protection of religious freedom. These episodes help document some of the many ways in which facially neutral laws were used and abused in the course of what was unquestionably one of the worst religious persecutions in U.S. history.

A. The Persecutions of Mormons in Missouri in the Late 1830's Exemplify Violations of Religious Rights that the Fourteenth Amendment was Designed to Remedy.

1. The Absence of Federal Remedies Meant That No Relief Was Available for the Persecutions of Mormons in Missouri.

In November, 1839, and again in February, 1840, Mormon leaders met with President Martin Van Buren to seek relief for persecutions that church members had suffered in Missouri. JAMES B. ALLEN & GLEN M. LEONARD, THE STORY OF THE LATTER-DAY SAINTS 144 (1976). After being pillaged, massacred, and deprived of their property, in many cases as a direct result of state action, the Mormons were ultimately forced out of Missouri under threat of an order signed by Missouri's governor directing that "[t]he Mormons

must be treated as enemies and must be *exterminated* or driven from the state." *Id.* at 127 (emphasis added); see *id.* at 81-93, 104-110, 120-130; LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 44-45 (1979); STEPHEN C. LESUEUR, THE 1838 MORMON WAR IN MISSOURI (1987). Church leaders turned to the President when all state-level efforts to find redress had been exhausted. His response was terse: "Gentleman, your cause is just, but I can do nothing for you."[4] The Fourteenth Amendment and RFRA, which enforces its mandate, was designed at least in part to fill this constitutional gap.

As a matter of constitutional law at the time, President Van Buren's statement was probably accurate. After all, the Supreme Court had held just a few years earlier that the Bill of Rights was not applicable to the states and operated only as a constraint on federal power. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Thus, neither the Free Exercise Clause nor the Takings Clause provided any basis for relief. This remained true a few years later, when persecutions culminated in the murder of Joseph Smith in 1844 by discharged state militiamen and the expulsion of Church members from Illinois under brutal winter conditions in 1845-46. ALLEN & LEONARD, *supra*, at 193-197, 220-233. Never again should such religious persecution be left without legal remedy.

2. The Fourteenth Amendment Was Designed in Part to Remedy Antebellum Incursions on the Free Exercise of Religious Minorities.

The same constitutional gap that barred relief to the early Mormons contributed contemporaneously to massive infringements of the religious liberty of slaves and religiously

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[4] JOSEPH SMITH, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 4:80, 5:393 (1949).

motivated abolitionists in the antebellum South. What is too often forgotten in reviewing the history of the Fourteenth Amendment is that its framers were concerned not only with guaranteeing the secular civil rights of the former slaves, but also with dismantling a variety of legal abuses that encroached on the free exercise rights of both the former slaves and those who opposed the institution of slavery.[5] Many of these abuses took the form of neutral, general laws, but their impact on free exercise was severe. Louisiana went so far as to make it a crime, punishable by death, to "write, print, publish or distribute" abolitionist literature, most of which was written out of religious conviction.[6] Black religious assemblies were heavily regulated, and curfew laws, while more neutral in tenor, drastically curtailed the possibility of black religious gatherings at night.[7] Generally applicable laws prohibiting slaves from being taught to read prevented slaves from reading the Bible.[8]

By the time the Fourteenth Amendment was framed, the fact that Mormons had been denied federal relief for intense persecution was largely forgotten, but anti-slavery forces were acutely aware that the absence of federal relief had

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[5] See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1131-37 (1994).

[6] See Digest of the Laws Relative to Slaves and People of Free Colour in the State of Louisiana (1835), *reprinted in* 2 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 47, 68 (Paul Finkelman ed. 1988). The law targeted "any thing having a tendency to produce discontent among the free coloured population of the State, or insubordination among the slaves therein," and violations were punishable by death or imprisonment.

[7] See Lash, *supra* note 5, at 1134-35 & nn.133-36 (collecting sources).

[8] *Id.* at 1135 & nn. 137-38 (collecting sources).

resulted in massive infractions of religious freedom in the antebellum South. For this reason, the free exercise of religion was clearly understood to be one of the "privileges and immunities of citizens of the United States" protected by Section 1 of the Fourteenth Amendment,[9] and, accordingly, Section 5 was understood as granting Congress power to remedy encroachments on religious freedom that had grown up in the absence of a federal remedy. The fight against slavery and against all the collateral structures that evolved to defend that institution sensitized the framers of the Fourteenth Amendment to the need for federal remedies capable of subjecting the facade of neutral, general laws woven by an entrenched majority to searching scrutiny when religious and other fundamental rights are at stake. The restructuring of American federalism that emerged from the cauldron of the Civil War was not accidental, and the new protection of the "privileges and immunities of citizens" was intended to fill a gap that had allowed endless suffering to minority religious groups.

B. The Use and Abuse of Ostensibly Neutral and General Laws Resulted in Serious Incursions on Religious Freedom in Territorial Utah.

From the 1850's until shortly before Utah achieved statehood in 1896, the federal government engaged in a

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[9] Senator Jacob Howard, commenting on the content of the "privileges and immunities" clause, indicated that it included "the personal rights guaranteed and secured by the first eight amendments to the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865). In the Forty-Second Congress, Henry L. Dawes stated that the "privileges and immunities" clause "secured the free exercise of * * * religious belief." CONG. GLOBE, 42d Cong., 1st Sess. 475 (1871). See also Lash, *supra* note 5, at 1146-49 & nn. 181-95 (collecting sources confirming that Fourteenth Amendment framers believed the "privileges and immunities" clause embraced free exercise of religion).

protracted and steadily intensifying conflict with the LDS Church that nearly ended in the Church's destruction.[10] In addition to directly outlawing the practice of certain fundamental doctrines of the Church,[11] the federal government passed a series of facially neutral laws that operated to increase federal pressure on the Church. For example, statutes were passed that effectively deprived Mormons of jury trial rights. See, *e.g.*, *Clawson v. United States*, 114 U.S. 477 (1885). In 1887, the Edmunds-Tucker Act had the effect of dismantling inheritance laws, overriding spousal immunity, and restricting the right to vote. 24 Stat. 635 (1887). In many areas, what began as neutral legislation was notched progressively tighter as persecution progressed. For example, in 1870, Utah's territorial legislature granted women the right to vote. But in 1887, the Edmunds-Tucker Act provided that "it shall not be lawful for any female to vote at any election hereafter held in the Territory." 24 Stat. 639, § 20. As the persecution reached a crescendo, territorial legislation was passed barring Mormons (regardless of sex) from voting and holding public office. Mere adherence to the Mormon faith was deemed sufficient to sustain disenfranchisement. See *Davis v. Beason*, 133 U.S. 333 (1890).

Not satisfied with these provisions, Congress passed more blatantly targeted provisions. At the height of the conflict in 1887, Congress took the outrageous and unprece-

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[10] See, *e.g.*, EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900, at 125-260 (1988).

[11] The question of plural marriage, of course, was addressed in *Reynolds v. United States*, 98 U.S. 145 (1878). The practice of plural marriage was abandoned by the Church in 1890, and in filing this *amicus* brief the Church has no interest in revisiting this issue.

dented step of eliminating the Church's legal existence by revoking its corporate charter and authorizing federal receivers to assume ownership of virtually all of the Church's property and other assets, including its most sacred houses of worship, temples in Logan, Manti, St. George, and Salt Lake City. See *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

As the Mormon experience demonstrates, a creative legislative body has little difficulty in fashioning facially neutral laws or administrative devices capable of imposing substantial burdens on a religious community. Congress may reasonably determine that the only effective way to ferret out illegitimate use of this potential is to subject state action that imposes substantial burdens on religion to searching scrutiny. That is what RFRA does.

II. WITHOUT RFRA, THE TYPES OF OVERT AND COVERT HOSTILITY TOWARD MINORITY RELIGIOUS FAITHS THAT HAVE AFFLICTED MORMONS ARE DESTINED TO IMPOSE IMPERMISSIBLE BURDENS ON A WIDE ARRAY OF RELIGIOUS PRACTICES.

Under *Smith*, "neutral" laws of "general applicability" are entitled to no special scrutiny under the Free Exercise Clause. 494 U.S. at 882. As long as legislation and/or administrative regulations are not specifically aimed at (or are not overtly hostile to) religion and apply across a relatively wide range of non-religious conduct, *Smith* assumes that religious liberty either will not be unduly trammeled or will be accommodated by exemptions crafted during the lawmaking process. *Id.* at 890. This logic is open to question. "There is nothing talismanic about neutral laws of general applicability * * * for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901 (O'Connor, J., concurring in the judgment).

History, in fact, demonstrates that "neutral" and "general" laws are often inimical to religious liberty. "Facially neutral laws of general application — the kind that raise no constitutional issue after *Smith* — were central to some of this country's worst religious persecutions. Both the polygamy law that underlay much of the Mormon persecution, and the flag salute law invoked against Jehovah's Witnesses, were facially neutral, generally applicable laws."[12] Moreover, "[i]f past is prologue, the forces of local, State, and Federal governmental power, now freed from the compelling governmental interest test [by *Smith*], will increasingly interfere with the free exercise of religion."[13] "The reason, quite simply, is that few laws that in fact inhibit the free exercise of religion are specifically aimed at religious practices." Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73, 86-87.

A sampling of contemporary post-*Smith* cases demonstrates that "neutral" laws of "general applicability" now dramatically intrude upon virtually every aspect of religious life. As a result of "neutral" and "general" laws, a Catholic hospital has been denied accreditation based on its refusal to instruct its residents on the performance of abortions notwithstanding strong religious objections to the taking of unborn life,[14] a religious mission for the homeless operated by

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[12] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 213 (1994) (footnote omitted).

[13] *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. at 24 (1992) (statement of Elder Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-day Saints).

[14] *Id.* at 157 (statement of Edward Gaffney, Dean and Profes-

Mother Teresa has been shut down because it was located on the second floor of a building without an elevator,[15] and children have been prevented from volunteering to care for their elderly parents housed in government regulated nursing homes.[16] Individuals in government custody have been denied access to religious paraphernalia without any inquiry into whether accommodation of the individual's sincere religious beliefs would impose any significant official burden at all.[17]

In fact, the potential incursion of facially "neutral" and "generally applicable" laws upon religious belief and practice is breathtaking. As noted in the Senate Report accompanying the passage of RFRA, the *Smith* standard places "all religious activity * * * at risk." *Religious Freedom Restoration Act of 1990: Hearings before the Subcomm. on Civil and Constitu-*

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sor of Law, Valparaiso University School of Law (citing *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990)); see *id.* ("Even on a belief so deeply and widely held as conscientious objection to the performance of an abortion, State officials ignored the [Supreme] Court's suggestion that it is desirable for the political branch to provide free exercise exemptions. And the courts, after *Smith*, thought it perilous to provide a remedy.").

[15] *Id.* at 149.

[16] In *Greater New York Health Care Facilities v. Axelrod*, 770 F. Supp. 183, 187 (S.D.N.Y. 1991), the district court summarily rejected challenges to health regulations that limited the service of volunteers in nursing homes despite the fact that, for some of the volunteers, the services represented their fulfillment of the Fifth Commandment obligation to honor one's father and mother.

[17] In *Friend v. Kolodzieczak*, 923 F.2d 126, 128 n.1 (9th Cir. 1991), the court upheld a prison regulation forbidding inmates from possessing rosaries and scapulars in their cells. The court in fact went so far as to assert that the denial did not even implicate a constitutional right.

tional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 23 (1990) (statement of Rep. Lamar Smith).[18] Even the long-established priest/penitent privilege is eroding.[19] Loyalty oaths may once again be imposed on government employees notwithstanding sincere religious objection.[20] And "neutral" and "generally applicable" laws might well force churches to hire homosexuals despite

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[18] Accord *Religious Freedom Restoration Act: Hearings before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 44 (1992) (statement of Rev. Oliver S. Thomas, Baptist Joint Committee on Public Affairs and the American Jewish Committee) ("Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. * * * In time, every religion in America will suffer."); *Religious Freedom Restoration Act of 1990: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 39-40 (1990) (statement of Rev. Robert P. Dugan, Jr., Director, Office of Public Affairs, National Association of Evangelicals) ("Must a Catholic church get permission from a landmarks commission before it can relocate its altar? Can orthodox Jewish basketball players be excluded from interscholastic competition because their religious belief requires them to wear yarmulkes? Are certain evangelical denominations going to be forced to ordain female ministers, or the Catholic church to ordain female priests? * * * Are school children, contrary to their religious beliefs, to be forced to salute the flag?").

[19] See, *e.g.*, *Mockaitis v. Harcleroad*, 938 F. Supp. 1516 (D. Or. 1996) (court refuses to destroy secret tape-recording by police of priest/penitent conversation); *Hutchison v. Luddy*, 414 Pa. Super. 138, 606 A.2d 905 (1992) (allowing discovery of church's sensitive confidential files even though the records were compiled and archived pursuant to canon law).

[20] See *Bessard v. California Community Colleges*, 867 F. Supp. 1454 (E.D. Cal. 1994).

contrary (and deeply held) religious beliefs.[21]

Of course, not every post-*Smith* intrusion upon religious belief and practice is likely to provoke a collective cry of alarm. Some religious liberties infringed by "neutral" and "generally applicable" laws (such as the right of Old Order Amish to refuse to display a fluorescent orange triangle on a horse-drawn buggy[22] or of Sikhs to decline to wear a motorcycle helmet because of a religious obligation to wear a turban[23]) seem rather prosaic in a pervasively secular society. The Free Exercise Clause exists, however, precisely because even prosaic violations of conscience are deeply felt. "The Constitution is to protect unpopular ideas, not popular ideas."[24] And many "neutral," "generally applicable" assaults upon religious practice are significant indeed.

For example, in *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990), the district court held that an unnecessary autopsy on a young Hmong man did not constitute a violation of the Free Exercise Clause, despite the religiously-based belief of his family that the autopsy condemned the spirit of the deceased. *Id.* at 560. The court had originally ruled in

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[21] See, *e.g.*, *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. 762 (Cal. Super. Ct. 1980) (church escaped liability for firing a homosexual only because the court applied the pre-*Smith* "compelling interest" test).

[22] See *Minnesota v. Hershberger*, 444 N.W.2d 282 (Minn. 1989), *vacated and remanded*, 495 U.S. 901 (1990), *upheld on state law grounds*, 462 N.W.2d 393 (Minn. 1990).

[23] See *Buhl v. Hannigan*, 20 Cal. Rptr. 2d 740 (Ct. App. 1993).

[24] See *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (Statement of Rep. Washington).

favor of the Yangs, but — following *Smith* — felt compelled to reverse its earlier ruling. The court nevertheless expressed its deep regret in applying the neutral, generally applicable autopsy law to the facts of the case:

> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief.

Id. at 558.[25]

Following *Smith*, government at all levels is busily dictating the outcome of deeply felt religious issues. State and local governments dramatically limit the use of property held for religious purposes.[26] States and municipalities require landlords to engage in rental practices that the

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[25] See also *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt conservative Jewish beliefs).

[26] See, *e.g.*, *Rectors, Wardens & Members of Vestry of Saint Bartholomew's Church v. City of New York*, 914 F.2d 348, 354-55 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (rejecting Free Exercise challenge to zoning law that excluded churches from commercial zones while permitting secular not-for-profit organizations to locate in such areas but remanding for equal protection clause claim).

landlords sincerely believe to be sinful.[27] Still other "neutral" laws have transformed religious societies from havens and sanctuaries into government enforcement agencies.[28]

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[27] See generally James C. Geoly & Kevin R. Gustafson, *Religious Liberty and Fair Housing: Must a Landlord Rent Against His Conscience?*, 29 J. MARSHALL L. REV. 455 (1996). In *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278-80 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994), for example, a landlord's refusal to rent to an unmarried couple violated state fair housing law and could not be excused on the ground that the landlord sincerely believed that his rental of the apartment would facilitate fornication and, therefore, be sinful). But *cf. Swanner v. Anchorage Equal Rights Comm'n*, 115 S. Ct. 460, 461-462 (1994) (Thomas, J., dissenting) (asserting that the Alaska Supreme Court improperly raised the value of fair housing over the fundamental right to free exercise of religious belief). See also *Smith v. Fair Employment & Housing Comm'n*, 51 Cal. Rptr. 2d 700, 709, 719 (Cal. 1996), *cert. pending*, No. 96-31 (July 8, 1996) (religious landlord could not discriminate against unmarried couples regardless of the religious beliefs of the landlord). Other state courts have protected religious landlords under state constitutional provisions. See, *e.g., Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (religiously motivated landlord exempted from fair housing laws regarding marital status on the basis of state religious liberty provisions); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (same).

[28] See, *e.g., United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (compelling the Society of Friends, commonly known as "the Quakers," to enforce an IRS levy against two employee-members who conscientiously refused to pay the military portion of their federal taxes despite the Friends' assertion that the IRS could not compel the Society to violate the religious beliefs of members by acting as an enforcement arm of the government). The oddity of the result in this case, however, did not go unnoticed by the district court. In ruling for the IRS, the court apologetically wrote:

The current legal regime, in fact, threatens not only the sacred beliefs of church members, but the financial stability of organized religion itself. Increasing numbers of bankruptcy trustees and private creditors are attempting to use federal bankruptcy and state fraudulent conveyance laws to recover ordinary course contributions made to churches by their members, even absent any badges of fraud.[29] Coerced recovery of honestly donated tithing monies and other contributions constitutes a gross abridgement of religious liberty. The practice of tithing is deeply rooted in the religious traditions of this nation and is essential for salvation in many religions — including the LDS faith. First mentioned in the Pentateuch, see *Leviticus* 27:30-32, tithing is more than a temporal rule of financial support for churches. It is a spiritual obligation to God, with associated blessings for the faithful and punishments for the disobedient.

> It is ironic that here in Pennsylvania, the woods to which Penn led the * * * Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so.

Id. at 1306. See also *American Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1990) (although Quaker beliefs require adherents to provide employment even to illegal immigrants, the sanctions established by the Immigration Reform and Control Act can be applied to a Quaker charitable organization).

[29] See, *e.g.*, *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *cert. pending*, No. 96-437; *Morris v. Midway So. Baptist Church (In re Newman)*, 1996 WL 711319 (D. Kan., Nov. 26, 1996); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge)*, 200 B.R. 884 (Bankr. D. Idaho 1996); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995).

> For I am the Lord * * *. Yet ye have robbed me. But ye say, Wherein have we robbed thee? In tithes and offerings. Ye are cursed with a curse: for ye have robbed me * * *. Bring ye all the tithes into the storehouse that there may be meat in mine house, and prove me now herewith, saith the Lord of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it. And I will rebuke the devourer for your sakes * * *.

Malachi 3:6, 8-11. As a result, the use of government resources to confiscate an honestly given tithe is a substantial disruption of an individual's religious exercise.

Tithing recovery imposes substantial burdens, not only upon believers, but on churches. Without legal protection, it will become a checklist item in every individual bankruptcy to demand return of any contributions to religious organizations, and churches will become the most common source of partial payment in consumer bankruptcies. This liability will impose heavy (perhaps crushing) financial burdens on churches, especially those with limited resources. Time and again churches will be compelled to defend large and small contributions alike against private creditors and bankruptcy trustees, the widow's mite going to pay lawyers instead of feeding the poor and constructing houses of worship. Churches will be forced to repay long-spent contributions from years past, disrupting budgets and programs, and occasionally to suffer the sale of religious property on the courthouse steps.

The foregoing discussion amply demonstrates that "[t]he connection between religious persecution and formal neutrality interpretations of the Free Exercise Clause is not merely theoretical. It is historical."[30] And what is at stake is

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[30] Douglas Laycock, *The Remnants of Free Exercise*, 1990

substantial. As spokespeople for the American Civil Liberties Union testified before Congress:

> At risk [are] such familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional, religious preferences in church hiring, establishing places of worship in areas zoned for other use, permitting religious sponsored hospitals to decline to provide abortion or contraception services, sex segregation during worship services, exemptions from mandatory retirement laws, a church's refusal to ordain women or homosexuals, exemptions from landmark and zoning regulations, and the inapplicability of highly intrusive educational rules to parochial schools. These [are] decisions in areas that society ha[s] previously assumed that religious groups had the right to make for themselves and could not be compelled to change just because society thought otherwise.

Religious Freedom Restoration Act: Hearings before the Senate Comm. on the Judiciary, 102d Cong., 2d Sess. 192 (1992) (statement of Nadine Strossen, President, and Robert S. Peck, Legislative Counsel, American Civil Liberties Union).

The history of the Mormon persecutions vividly illustrates that "neutral" and "general" laws do not adequately protect the values underlying the Free Exercise Clause, and the contemporary instances of abuse sketched above — from "general" laws regulating abortion (note 14, *supra*) to the "neutral" provisions of the Bankruptcy Code (note 29, *supra*) — demonstrate that the lessons from that history have not been entirely learned. "Although many private interests are sacrificed as a price of living in a civilized society, the free exercise of religion cannot be one

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SUP. CT. REV. 1, 64.

of them. Free exercise has at least as great a claim to the protection of heightened scrutiny as any other right afforded such protection [under the Constitution]." Lee, *supra*, 1993 B.Y.U. L. REV. at 95.

III. IN ENACTING RFRA, CONGRESS PROPERLY COMPENSATED FOR STRUCTURAL BIASES THAT IMPEDE THE EXERCISE OF RELIGIOUS LIBERTY.

History's lesson regarding the importance of heightened scrutiny for free exercise of religion is particularly evident in the present case. According to Petitioner, St. Peter Church in Boerne embodies "times and memories [that] are graven into the souls of a city," and "this highly visible church set on a hill speaks directly of the history of this City and its people." Pet. Br. 2. The City's memory is quite selective. Indeed, there is a perverse irony in its claim: the church is located where it is, on a hill near the edge of town, only because the City refused to allow churches within the city limits when the parish was founded. KENDALL COUNTY HISTORICAL COMM'N, A HISTORY OF KENDALL COUNTY TEXAS 22 (1984); Gregory Curtis, *The Church on the Hill*, TEXAS MONTHLY 9 (Dec. 1996). The City no doubt intended to recall something other than the history of religious persecution with its description of the cultural value of the church. But, by denying the church the right to expand, the City imposes substantial burdens on both the rights of believers who are forced to worship in inadequate alternative facilities and the rights of the church itself to determine how it should best fulfill its religious responsibilities to its parishioners. In doing so, the City exhibits a subtle contemporary version of its earlier exclusionary practices: active religious life is disparaged, marginalized, and cast outside the limits of the secularist city, which treasures religious museums but fails to comprehend the needs of living religion. Without RFRA, what may in fact be graven into the soul of the City is a secularist insensitivity

that exalts historical preservation of a past contribution of religious life (the church building) over preserving the religious rights of today's living Catholic community.

A. Congress Has Authority to Remedy Violations of Religious Liberty Stemming From a Growing Secularist Bias that Distorts Governmental Neutrality.

The tension between religious and secularist outlooks in this case is an instance of a much broader phenomenon that James Davison Hunter has aptly described as "culture war." JAMES DAVISON HUNTER, CULTURE WARS (1991). Older patterns of tension along sectarian lines have been supplanted by a broad polarization cutting across all major areas of culture that divides traditional religious believers from those with more secularist orientations. *Id.*; W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions,* 1993 B.Y.U. L. REV. 421, 434-37. Whereas formerly, secular interests could fairly be said to be neutral as between different religious traditions, there are a growing number of areas in which secularist objectives are anything but neutral from a religious perspective. Religious considerations are thereby undervalued in secular bureaucracies because of the tendency of secular bureaucrats to confuse secularity with neutrality. If the two were identical, any interest with a secular agenda would be empowered by *Smith* to trump religious rights. The secularity of the agenda clearly does not insure its neutrality toward religious groups and beliefs at the other pole of the "culture war."

The culture wars have produced organized interest groups who are affirmatively hostile to religion in general, or to certain religions in particular. For examples of contemporary anti-Catholicism, see Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 440-442 (1994); Edward McGlynn Gaffney, Jr.,

Hostility to Religion, American Style, 42 DEPAUL L. REV. 263, 279-293 (1992); for a book-length anti-Baptist hate tract, see ARTHUR FREDERICK IDE, EVANGELICAL TERRORISM: CENSORSHIP, FALWELL, ROBERTSON & THE SEAMY SIDE OF CHRISTIAN FUNDAMENTALISM (1986); for an account of organized hostility to religious "cults," see ANSON SHUPE & DAVID BROMLEY, THE NEW VIGILANTES (1980); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 64-65. For examination of the theoretical underpinnings of hostility to religion, see Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); Michael W. McConnell, *"God is Dead and We Have Killed Him": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163. Public opinion polls, cited in the brief of Respondent Flores, show widespread hostility to "fundamentalists" and "members of minority religious sects or cults." Resp. Br. 30.

It is generally impossible to know, let alone prove to judicial satisfaction, when this religious hostility has contributed to legislation, or when it has caused legislators or bureaucrats to refuse a religious exemption in circumstances where they would have granted an exemption to a well-connected secular interest group. But these things happen, and they happen frequently. RFRA merely requires the *government* to justify the resultant burdens on religion instead of making the *burdened claimant* prove discrimination.

B. Congress May Legitimately Act to Correct the Encroachments on Religious Liberty Emanating From the Structure of Modern Bureaucratic Government.

Our world has been accurately described as one in which "regulation is everywhere." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 144 (1993). Federal and state laws govern most of American life, usually through broad delegations of interpretive, enforcement, and regulatory authority

to administrative and local government agencies. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-517.

The nature of modern administrative bureaucracy makes it nearly inevitable that government will impose substantial burdens on religious practice—especially minority religious practice—in the pursuit of relatively unimportant government goals. In the first place, a variety of factors drive administrative agencies to seek to expand their jurisdiction. Too often, efforts in this regard carry regulatory bureaucrats into domains that should in fact be protected spheres of religious autonomy. Moreover, agencies understandably seek to maximize the consistency of their rules and regulations. Exceptions to rules and regulations are unattractive from the perspective of efficiency and administrative convenience, and, if granted too liberally, may result in the agency's having to defend its very existence. Furthermore, government officials who are unfamiliar with distinctive religious needs may think there is no rational basis for differential treatment. Thus, the nature of administrative bureaucracy influences administrators to exercise discretion against accommodating the religious practices of those burdened by agency action.

The threat to religious liberty posed by agency bias against exemptions is heightened by the general absence and/or ineffectiveness of judicial review of agency decisions. Judicial review of agency decisions, particularly those by state agencies and local governments entities, is sometimes not available at all. See, *e.g.*, DANIEL R. MANDELKER, LAND USE LAW § 8.11, at 326 (2d ed. 1988) (noting that most state zoning acts do not provide for judicial review of decisions by planning commissions and other local government entities that administer zoning ordinances). Grants of statutory authority to agencies are typically broad and general, giving such agencies tremendous discretion in making decisions about how to implement their statutory

purpose. It is also well established that, even when judicial review of agency decisions exists, courts owe substantial deference to discretionary decisions made by administrative agencies within their areas of expertise. *E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-845, 865-866 (1984); *Blum v. Bacon*, 457 U.S. 132, 141 (1982); Scalia, *supra*, 1989 DUKE L.J. at 516-517. In sum, by their nature, agencies are unlikely to grant exemptions to those who are religiously burdened, and these refusals are effectively unreviewable under a deferential standard of judicial scrutiny.

The very case before the Court illustrates the lack of protection afforded the free exercise of religion in such circumstances. Boerne's historic preservation ordinance created a commission charged with drafting and administering an historic preservation plan, to include "Historic Districts," and vested with broad discretion to "protect, enhance and perpetuate selected historic landmarks," "safeguard the City's historic and cultural heritage," "stabilize property values," "foster civic pride" in the past, "protect and enhance the City's attractions to tourists," "strengthen the economy," and promote the use of protected landmarks and sites "for the culture, prosperity, education and general welfare" of the City's residents and visitors. Pet. Br. 2-3; Pet. App. 2a. It was this commission that denied church authorities permission to expand the Church, on the ground that expansion was inconsistent with the "spirit and purpose" of the preservation ordinance. Jt. App. 38, 68-69 ¶ v.

Without RFRA, the sheer breadth of the commission's mandate doomed the Church's interests from the beginning. Among other things, the definition of the City's "historic and cultural heritage," the designation of landmarks and districts that reflect this heritage, and judgments about property values, civic pride, tourism and the like, are discretionary decisions made under a general grant of authority. Although the commission identified criteria authorized by the ordinance

in reaching its decision to disallow Church expansion, Jt. App. 38, 67 ¶ l, this was hardly critical to the validity of that decision; the ordinance is so broadly worded that it is difficult to imagine any decision that would be inconsistent with its "spirit and purposes."

Moreover, a superficial analysis of the ordinance could easily lead a court to conclude that heightened scrutiny is not required. After all, there is nothing on the face of the ordinance to suggest that it is directed at a particular religion or at religion generally. Moreover, even though only a small part of the City is regulated under the ordinance, courts have found similar landmark laws to be neutral and generally applicable. See, *e.g.*, *Rectors, Wardens & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353-356 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Thus, without RFRA, the question of whether the commission's decisions impermissibly intrude on valid religious freedom rights would be virtually immune from judicial review. *Cf. City of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinances to be upheld unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). Even though the Church is merely a twentieth-century imitation of Spanish mission architecture, Pet. Br. 2, Resp. Br. 1; even though only the facade of the Church originally rested within an Historic District, Jt. App. 68 ¶ s, 70 ¶ gg; and even though the proposed expansion of the church would have left this facade intact, Jt. App. 7 ¶ 12, the merits of the commission's determination that expansion would nonetheless destroy a portion of the City's historic and cultural heritage are effectively unreviewable. Far more important than any of this, however, is the unreviewability of the commission's implicit determination that preservation of the Church building as a relic of the past is more important than permitting Church members to worship in the present.

Our current age of pervasive bureaucracy, in which government rules and regulations administered according to the discretion of administrative agencies control virtually every area of American life, demands additional protection for religious practice if the full measure of religious liberty guaranteed by the First Amendment is to be realized. Land use provisions in particular characteristically involve permit schemes analogous to those struck down in *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940), which grant local officials essentially standardless discretion to determine whether religious practices may go forward. Constitutional rights to the free exercise of religion are of little practical value if they permit control of the meeting place of a church to pass from its members to government outsiders without any examination of the government's asserted need for such control. Yet, unless the goals of regulatory agencies like the City's historic preservation commission are tested against more searching scrutiny than neutrality and general applicability, agency officials have no occasion and no motivation to consider the value of pursuing their regulatory goals relative to the substantial burdens this pursuit may impose on the free exercise of religion. As this Court noted in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)), "The Free Exercise Clause protects against governmental hostility which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" RFRA simply provides the occasion and the motivation to scrutinize such gerrymanders, by requiring that regulators identify a genuinely important government goal that cannot be achieved without burdening religious practice in some less restrictive manner.

C. RFRA Compensates for Inherent Limits on Legislative Capacity to Craft Religiously Sensitive Exemptions.

In *Smith*, this Court acknowledged the possibility that religious practice exemptions could appropriately be crafted within the political process. 494 U.S. at 890. In fact, such accommodations are found at countless points throughout the laws and regulations of the nation. They reflect the general respect of lawmakers for the principles of religious freedom that make our pluralistic society possible. Frequently, however, lawmakers fail to make appropriate exemptions not because they necessarily wish to decline granting the exemption, but because no legislative body can be aware of the full range of religious needs warranting exemptions. See, *e.g.*, *Axelrod*, *supra* note 16 (failing to exempt religiously motivated volunteer services from a regulatory limit on non-compensated services); *Bessard*, *supra* note 20 (requiring a loyalty oath not withstanding religious beliefs proscribing execution of such a pledge); *Hershberger*, *supra* note 22 (requiring vehicular signals that intrude upon religious beliefs even though state's interest could be furthered by means that do not require violation of conscience); *Buhl*, *supra* note 23 (motorcycle helmet law fails to accommodate religious beliefs that preclude wearing a helmet). Alternatively, even when exemptions are granted, they may be insufficiently broad. See, *e.g.*, note 15, *supra* (failing to exempt religious shelter for the homeless from a housing regulation designed to facilitate access by the handicapped); *Montgomery*, *supra* note 25 (general autopsy laws require procedures that condemn the spirit of the deceased); note 27 *supra* (fair housing laws fail to accommodate practices that landlords sincerely believe to be sinful); note 28 *supra* (government enforcement scheme compels church to violate the conscientious beliefs of its members). However, even where well-intentioned lawmakers attempt to craft appropriate exemptions, their efforts often fail to achieve the accommodation

they intend, because of the complexity and diversity of religious beliefs themselves. See, *e.g.*, note 14 (failing to make sufficiently broad exemptions for conscientious objection to abortion). Even a lawmaker with the best of intentions may not be able to craft an exemption sufficiently refined to address the legitimate needs of all religious groups. The remedial influence of RFRA is vital in such settings to prevent religious groups from being forced into wooden pigeonholes created by insufficiently sensitive exemption schemes.

D. Congress May Legitimately Reallocate Burdens of Justification When Proof of Constitutional Violations Is Difficult to Obtain.

In the absence of RFRA, a claimant whose religious practice is burdened by law can obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind a law, and thus that it is not genuinely neutral or general. See *Lukumi*, 508 U.S. at 524, 533, 537-538, 543-545. The difficulties in doing so are considerable. Assuming that government decisionmakers intend the reasonably foreseeable consequences of their lawmaking actions, judges can of course make responsible judgments about the purpose of a law based on its language and effect. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Once the inquiry ventures past these external indications of purpose to the subjective intentions of members of the lawmaking body, however, reliable conclusions about government motivations are nearly impossible to reach. See *id.* at 636 (Scalia, J., dissenting); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). Although statements of intention by individual decisionmakers can sometimes be found in legislative histories, such histories are not always compiled, particularly in cases involving state legislation or discretionary administrative action, and are in any event subject to manipulation. See *Edwards*, 482 U.S. at 638 (Scalia, J., dissenting). Even when they exist, statements of individual

decisionmakers, while highly probative of the intentions of those who make them, are only circumstantial evidence of the motivation of the decisionmaking body as a whole. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Finally, courts are understandably reluctant to find unconstitutional motivations because of the implicit insult such a finding directs at members of the decisionmaking body. See, *e.g.*, *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1093 (1969). This is especially true when, as is almost always the case, direct evidence of unconstitutional motivations is lacking. *Cf. O'Brien*, 391 U.S. at 384 (observing that "the stakes are sufficiently high for us to eschew guesswork" in determining whether government action was unconstitutionally motivated).

The virtual impossibility of adducing strong evidence of illicit motivation, combined with the reticence of judges to find such motivation on anything but the strongest evidentiary record, suggest that deserving religious claimants will frequently be unable to show the impermissible motivation behind facially neutral and general laws, even in situations in which the government decisionmaking body in fact intended to restrict the claimants' religious practice or consciously valued secular interests over the claimants' religious ones. RFRA's compelling interest standard does nothing more than compensate for the structural bias associated with the difficulty of proving motivation: it simply reallocates from the religious practitioner to the government the burden of proof with respect to whether facially neutral and general laws are tainted by impermissible motives.

E. Legitimate Religious Freedom Claims in the Field of Land Use Regulation Are Likely to Be Inadequately Protected Without RFRA.

The foregoing structural biases against full recognition of free exercise rights are particularly evident in land use decisions. In preparing this brief, an effort was made to

analyze all reported cases that have dealt with religion claims in the context of zoning cases.[31] The results are presented as the Appendix. What is striking is that, while minority religions represent considerably less than 9% of the general population, they are involved in over 49% of the cases involving the right to locate a church at a particular site, and in over 33% of the cases seeking approval of accessory uses of an existing church site (*e.g.*, for sheltering or feeding the homeless). The disproportionate burden carried by minority religions becomes even more distressing if one takes into account cases involving non-denominational groups, or groups that cannot be classified on the basis of information in case reports. If these unclassified cases are counted, over 68% of reported location cases, and over 50% of accessory use cases, involve minority religions.

If the experience of the LDS Church is any indicator, the foregoing statistics significantly underreport the number of problems that minority churches face. The vague standards of land use law leave room for anti-minority biases to have effect. Congress could legitimately address these problems in passing RFRA.

CONCLUSION

For all of the foregoing reasons, together with those advanced by the Coalition and Respondent Flores, the decision of the Court of Appeals should be affirmed.

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[31] The study includes cases cited in the relevant A.L.R. annotations, a leading treatise, and the relevant Westlaw keynote classification. The methodology used to select the cases is described in more detail in the Appendix.

Respectfully submitted.

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JANUARY 1997

APPENDIX

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DISCRIMINATION AGAINST MINORITY CHURCHES IN ZONING CASES

In order to gain some perspective on the treatment of non-mainline groups in zoning cases, a broad sample of zoning decisions challenged on free exercise grounds has been analyzed. A total of 196 cases was ultimately included in the study. This set of cases should include a fairly comprehensive set of reported cases in this field. It includes all cases cited in annotations that have collected cases on this topic (including cases cited in pocket part updates),[1] all cases cited in the section of a leading treatise on zoning that addresses issues of religious land uses,[2] and all cases identified through a Westlaw search classified under West's Constitutional Law Key Number 84.5(18), which collects religion cases involving zoning and land use. It is conceivable that some cases involving religion-based constitutional challenges to zoning decisions may not have been captured through these sources, but it is unlikely that there are many such cases.

The cases thus collected have been classified by the type of zoning case and by the denomination involved. Essentially, the zoning issues fall into two broad categories: cases that involve zoning of property to permit a church building to be erected on a particular site ("location cases"), and cases that determine whether an accessory use (such as

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[1] Jay M. Zitter, Annotation, *What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance*, 11 A.L.R.4th 1084 (1992); Jeffrey F. Ghent, Annotation, *Definition of Church or Religious Use Within Zoning Ordinances*, 62 A.L.R.3d 197 (1967); Annotation, *Zoning Regulations as Affecting Churches*, 74 A.L.R.2d 377 (1961).

[2] A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 20 (4th ed. 1992).

a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases").

In most of the cases, the denomination involved is obvious either from the case name or from discussion of the case in the opinion. There are, however, a substantial number of cases in which either no denominational affiliation appears in the case, or the church involved is non-denominational. These cases are designated as "unclassified" in the tables below. While some of the unclassified religious associations may in fact have a denominational affiliation that simply is not evident from the cases, most of these cases appear to involve local, congregationally organized churches that are functionally similar to organizations we have classified as minority churches.

Information on the size of various denominations was derived from tables provided in BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 15-17 (1993). The data is derived from the National Survey of Religious Identification conducted by the Graduate School of the City University of New York, which surveyed a representative sample of 113,000 people across the continental United States. This is the most comprehensive poll ever conducted on the issue of religious affiliation. *Id.* at 1-2. It provides the best available data of religious affiliation as assessed from the perspective of the believer.

The line between mainline denominations and smaller groups is difficult to draw, because one is dealing with a continuum. For purposes of this study, groups with more than 1.5% of the adult population were treated as mainline groups, whereas groups with smaller percentages were included in the minority category. The only exception in the tables that follow is Judaism, but if the statistics on Judaism were divided to reflect the major branches of that tradition,

the various branches would come under the 1.5% threshold. Some smaller Protestant groups may be more analogous to mainline groups, so that the categorizations in a few cases could be questioned.

The population percentages in the tables that follow do not add up to 100% because the tables do not include data on non-religious groups and on the portion of the population (only 2.30%) that did not respond to the survey. Many smaller religions were not covered by the study because they have no reported cases, but such religions represent only 2.22% of the population.

In analyzing the data, a basic starting assumption is that any zoning dispute that progresses far enough into litigation to yield a reported decision reflects a situation in which religious groups *perceive* that their religious rights are being violated. For a variety of practical reasons, ranging from the need to have a good working relationship with local government officials to the sheer cost of litigation to the availability of alternative sites, churches probably bring fewer actions in this area than they think they may be entitled to bring. Table 1 summarizes the number of cases in the location and accessory use categories by denomination.

TABLE 1

Zoning Cases by Denomination					
Denomination	**Self-Described % of Adult Population**	**# of Location Cases**	**%**	**# of Accessory Use Cases**	**%**
Larger Denominations					
Catholics	26.20%	16	12.80%	13	20.00%
Major Protestants (>1.5% of Adult U.S. Population)					
Baptists	19.40%	7	5.60%	7	10.77%
Episcopal	1.70%	4	3.20%	2	3.08%
Lutheran	5.20%	6	4.80%	3	4.62%
Methodist	8.00%	3	2.40%	2	3.08%
Pentecostal	1.80%	1	0.80%	0	0.00%
Presbyterian	2.80%	2	1.60%	3	4.62%
Subtotal:	38.90%	23	18.40%	17	26.15%
Minority Denominations (<1.5% of U.S. Population)					
Assemblies of God	0.37%	0	0.00%	4	3.20%
Buddhist	0.40%	0	0.00%	1	1.54%
Christian Science	0.12%	1	0.80%	1	1.54%
Churches of Christ	1.00%	0	0.00%	1	1.54%
Church of God	0.30%	3	2.40%	1	1.54%
Church of LDS	1.40%	3	2.40%	1	1.54%
Eastern Orthodox	0.28%	1	0.80%	1	1.54%
Evangelical	0.14%	2	1.60%	0	0.00%
Hare Krishna	0.30%	1	0.80%	0	0.00%
Islam	0.50%	2	1.60%	0	0.00%
Jehovah's Witness	0.80%	19	15.20%	1	1.54%
Judaism	2.20%	25	20.00%	11	16.92%
Quakers	0.04%	1	0.80%	0	0.00%
Seventh Day Adventists	0.38%	1	0.80%	0	0.00%
Unification Church	0.30%	2	1.60%	1	1.54%
Unitarian	0.30%	1	0.80%	1	1.54%
Minority Cases	8.83%	62	49.60%	24	33.97%
Unclassified	14.78%	24	19.20%	11	16.92%
Minority + Unclassified	23.61%	86	68.80%	11	16.92%
Total Cases		125	100.00%	65	100.00%

The figures indicated in Table 1 already suggest that a substantial amount of the litigation in this area involves

minority religious groups. This burden is more pronounced when compared to the percentage of groups from these denominations in the general population. Table 2 provides these comparisons.

TABLE 2

Percentages of Zoning Cases by Denominational Group and Percentage of United States Population			
Denomination	**Self-Described % of Adult Population**	**Location Cases (%)**	**Accessory Use Cases (%)**
Larger Denominations			
Catholics	26.20%	12.80%	20.00%
Major Protestants (>1.5% of Adult U.S. Population)			
Baptists	19.40%	5.60%	10.77%
Episcopal	1.70%	3.20%	3.08%
Lutheran	5.20%	4.80%	4.62%
Methodist	8.00%	2.40%	3.08%
Pentecostal	1.80%	0.80%	0.00%
Presbyterian	2.80%	1.60%	4.62%
Subtotal:	38.90%	18.40%	26.15%
Minority Denominations (<1.5% of U.S. Population)			
Assemblies of God	0.37%	0.00%	3.20%
Buddist	0.40%	0.00%	1.54%
Christian Science	0.12%	0.80%	1.54%
Churches of Christ	1.00%	0.00%	1.54%
Church of God	0.30%	2.40%	1.54%
Church of LDS	1.40%	2.40%	1.54%
Eastern Orthodox	0.28%	0.80%	1.54%
Evangelical	0.14%	1.60%	0.00%
Hare Krishna	0.30%	0.80%	0.00%
Islam	0.50%	1.60%	0.00%
Jehovah's Witness	0.80%	15.20%	1.54%
Judaism	2.20%	20.00%	16.92%
Quakers	0.04%	0.80%	0.00%
Seventh Day Adventists	0.38%	0.80%	0.00%
Unification Church	0.30%	1.60%	1.54%
Unitarian	0.30%	0.80%	1.54%
Minority Cases	8.83%	49.60%	33.97%
Unclassified	14.78%	19.20%	16.92%
Minority + Unclassified	23.61%	68.80%	50.89%
Total Cases		100%	100%

The data in Table 2 are not wholly satisfactory, because the relative populations of various religious groups vary over the rather lengthy period from which the cases are drawn, whereas the population figures, to the extent they are available, are quite recent. Nonetheless, the figures suffice to give a rough sense for how the percentage of cases in which a given religious society is involved corresponds with that society's percentage representation in the population as a whole. These figures strongly suggest that a high percentage of cases are being contested by religious groups comprising a very small percentage of the total population.

TABLE 3

Zoning Cases by Denomination: Claims Granted and Denied						
Denominations	**Claims Granted**	**% of Total Claims**	**% of Denom's Claims**	**Claims Denied**	**% of Total Claims**	**% of Denom's Claims**
Larger Denominations						
Catholics	19	10.00%	65.52%	10	5.26%	34.48%
Major Protestants (>1.5% of Adult U.S. Population)						
Baptists	4	2.11%	28.57%	10	5.26%	71.43%
Episcopal	6	3.16%	100.00%	0	0.00%	0.00%
Lutheran	6	3.16%	66.67%	3	1.58%	33.33%
Methodist	4	2.11%	80.00%	1	0.53%	20.00%
Pentecostal	1	0.53%	100.00%	0	0.00%	0.00%
Presbyterian	5	2.63%	100.00%	0	0.00%	0.00%
Subtotal:	26	13.68%	65.00%	14	7.37%	35.00%
Minority Denominations (<1.5% of U.S. Population)						
Assemblies of God	0	0.00%	0.00%	4	2.11%	100.00%
Buddhist	1	0.53%	100.00%	0	0.00%	0.00%
Christian Science	1	0.53%	50.00%	1	0.53%	50.00%
Churches of Christ	1	0.53%	100.00%	0	0.00%	0.00%
Church of God	2	1.05%	50.00%	2	1.05%	50.00%
Church of LDS	2	1.05%	50.00%	2	1.05%	50.00%
Eastern Orthodox	0	0.00%	0.00%	2	1.05%	100.00%
Evangelical	1	0.53%	50.00%	1	0.53%	50.00%
Hare Krishna	0	0.00%	0.00%	1	0.53%	100.00%
Islam	2	1.05%	100.00%	0	0.00%	0.00%
Jehovah's Witness	11	5.79%	55.00%	9	4.74%	45.00%
Judaism	30	15.79%	83.33%	6	3.16%	16.67%
Quakers	1	0.53%	100.00%	0	0.00%	0.00%
Seventh Day Adventists	1	0.53%	100.00%	0	0.00%	0.00%
Unification Church	2	1.05%	66.67%	1	0.53%	33.33%
Unitarian	2	1.05%	100.00%	0	0.00%	0.00%
Minority Cases	57	30.00%	66.28%	29	33.72%	33.72%
Unclassified	17	8.95%	48.57%	18	9.47%	51.43%
Minority + Unclassified	74	38.95%	61.16%	47	24.74%	38.84%
Total Cases	119	62.63%	62.63%	71	37.37%	37.37%

According to Table 3, 63% of religious claims were granted, and 37% were denied. At the judicial level, minority groups appear to fare slightly better than mainline groups: they won 57 cases, or 66% of the cases in which they were involved; majority religions prevailed in 26 cases, or 65% of the cases in which they were involved. Among other things, these figures suggest that judicial review does help remedy the problems minority groups face, and tends to be impartial across groups. Since the data do not indicate that the higher percentage of cases in which minority religions are involved reflect higher levels of ungrounded claims, Table 2's data showing that minority groups face a substantially greater level of problems in the zoning area than mainline churches seems sound.

The percentage of cases in which various denominations' religious challenges to zoning decisions have been won and lost is summarized in Table 4. The figures show the number of claims won and lost both as percentages of the total number of cases and as percentages of the total number of claims in which each denomination (or group of denominations) is involved.

TABLE 4

Percentages of Zoning Cases Won and Lost by Denominational Groups and Percentage of United States Population			
Denomination	**Self-Described % of Adult Population**	**Cases Won as % of Total Cases**	**Cases Lost as % of Total Cases**
Larger Denominations			
Catholics	26.20%	10.00%	5.26%
Major Protestants (>1.5% of Adult U.S. Population)			
Baptists	19.40%	2.11%	5.26%
Episcopal	1.70%	3.16%	0.00%
Lutheran	5.20%	3.16%	1.58%
Methodist	8.00%	2.11%	0.53%
Pentecostal	1.80%	0.53%	0.00%
Presbyterian	2.80%	2.63%	0.00%
Subtotal:	38.90%	13.68%	7.37%
Minority Denominations (<1.5% of U.S. Population)			
Assemblies of God	0.37%	0.00%	2.11%
Buddhist	0.40%	0.53%	0.00%
Christian Science	0.12%	0.53%	0.53%
Churches of Christ	1.00%	0.53%	0.00%
Church of God	0.30%	1.05%	1.05%
Church of LDS	1.40%	1.05%	1.05%
Eastern Orthodox	0.28%	0.00%	1.05%
Evangelical	0.14%	0.53%	0.53%
Hare Krishna	0.30%	0.00%	0.53%
Islam	0.50%	1.05%	0.00%
Jehovah's Witnesses	0.80%	5.79%	4.74%
Judaism	2.20%	15.79%	3.16%
Quakers	0.04%	0.53%	0.00%
Seventh Day Adventists	0.38%	0.53%	0.00%
Unification Church	0.30%	1.05%	0.53%
Unitarian	0.30%	1.05%	0.00%
Minority Cases	8.83%	30.00%	15.26%
Unclassified	14.78%	8.95%	9.47%
Minority + Unclassified		38.95%	24.74%
Total Cases		62.63%	37.37%

The foregoing data suggest that a variety of factors are operating in the zoning area in the United States that lead to de facto discrimination against smaller religious groups. This confirms that behind the surface of ostensibly neutral zoning laws, a variety of discriminatory and prejudicial factors may be operational that have the effect of violating the religious rights of minority groups.

To facilitate access to the data provided in this appendix, the cases reviewed are listed below, classified as they have been categorized in the study. Within each denominational category, the citations appear alphabetically by jurisdiction (with federal cases preceding state cases) in reverse chronological order. The parentheticals following the citations indicate how the case was classified for purposes of the study. The letters in the parentheticals have the following meanings:

G = The religious organization prevailed on the religious claim asserted.
D = The religious claim asserted was denied.
L = The case was a "location" case.
A = The case was an "accessory use" case.

Catholic:

Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879 (D. Md. 1996) (D) (A)

Ellsworth v. Gercke, 156 P.2d 242 (Ariz. 1945) (G) (L)

Ramona Convent of Holy Names v. City of Alhambra, 26 Cal. Rptr. 2d 140 (Ct. App. 1993) (D) (A)

Tustin Heights Ass'n v. Board of Supervisors of County of Orange, 339 P.2d 914 (Cal. Dist. Ct. App. 1959) (D) (L)

St. John's Roman Catholic Church Corp. v. Town of Darien, 184 A.2d 42 (Conn. 1959) (D) (L)

Daughters of St. Paul v. Zoning Board, 549 A.2d 1076 (Conn. App. Ct. 1988) (G) (A)

Hull v. Miami Shores Village, 435 So. 2d 868 (Fla. Dist. Ct. App. 1983) (D)(A)

Diakonian Soc'y v. City of Chicago, 380 N.E.2d 843 (Ill. App. Ct. 1978) (G) (L)

Board of Zoning Appeals v. Wheaton, 76 N.E.2d 597 (Ind. Ct. App. 1948) (G) (A)

Society of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (G) (L)

Sisters of Holy Cross of Mass. v. Town of Brookline, 198 N.E.2d 624 (Mass. 1964) (G) (L)

Mooney v. Village of Orchard Lake, 53 N.W.2d 308 (Mich. 1952) (G) (L)

City of Minneapolis v. Church Universal & Triumphant, 339 N.W.2d 880 (Minn. 1983) (G) (L)

Association for Educ. Dev. v. Hayward, 533 S.W.2d 579 (Mo. 1976) (G) (A)

Black v. Town of Montclair, 167 A.2d 388 (N.J. 1961) (G) (A)

Andrews v. Board of Adjustment, 143 A.2d 262 (N.J. Super. Ct. Law Div. 1958) (G) (A)

Diocese of Rochester v. Planning Board, 136 N.E.2d 827 (N.Y. 1956) (G) (L)

Diocese of Buffalo v. Buckowski, 446 N.Y.S.2d 1015 (Sup. Ct. 1982) (D) (L)

Province of Meribah Soc'y of Mary, Inc. v. Village of Muttontown, 538 N.Y.S.2d 850 (App. Div. 1989) (D) (A)

American Friends of Soc'y of St. Pius, Inc. v. Schwab, 417 N.Y.S.2d 991 (App. Div. 1979) (G) (L)

People v. Kalayjiam, 352 N.Y.S.2d 115 (App. Div. 1973) (D) (L)

Franciscan Missionaries of Mary v. Herdman, 184 N.Y.S.2d 104 (App. Div. 1959) (G) (A)

Hayes v. Fowler, 473 S.E.2d 442 (N.C. Ct. App. 1996) (G) (A)

Allen v. City of Burlington Board of Adjustment, 397 S.E.2d 657 (N.C. Ct. App. 1990) (G) (L)

Archdiocese v. Washington County, 458 P.2d 682 (Or. 1969) (D) (L)

O'Hara v. Board of Adjustment, 131 A.2d 587 (Pa. 1957) (D) (L)

Stark's Appeal, 72 Pa. D. & C. 1681 (Pa. 1950) (G) (A)

In re Appeal of Hoffman, 444 A.2d 764 (Pa. Commw. Ct. 1982) (G) (A)

State ex rel. Roman Catholic Bishop v. Hill, 90 P.2d 217 (Nev. 1939) (G) (L)

Major Protestant:

Baptist:

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988) (D) (L)

Messiah Baptist Church v. County of Jefferson, 697 F. Supp. 396 (D. Colo. 1987) (D) (L)

Ex Parte Fairhope Bd. of Adjustments, 567 So. 2d 1353 (Ala. 1990) (D) (A)

Corinth Baptist Church v. State Dep't of Transp., 656 So. 2d 868 (Ala. Civ. Ct. App. 1995) (D) (A)

Cochise County v. Broken Arrow Baptist Church, 778 P.2d 1302 (Ariz. Ct. App. 1989) (D) (L)

Abram v. City of Fayetteville, 661 S.W.2d 371 (Ark. 1983) (D) (A)

City of Chico v. First Ave. Baptist Church, 238 P.2d 587 (Cal. Dist. Ct. App. 1951) (D) (L)

East Side Baptist Church of Denver v. Klein, 487 P.2d 549 (Colo. 1971) (D) (A)

Parkview Baptist Church v. City of Pueblo, 336 P.2d 310 (Colo. 1959) (D) (A)

North Syracuse First Baptist Church v. Village of N. Syracuse, 524 N.Y.S.2d 894 (App. Div. 1988) (G) (A)

Yocum v. Power, 157 A.2d 368 (Pa. 1960) (G) (L)

Antrim Faith Baptist Church v. Commonwealth, 460 A.2d 1228 (Pa. Commw. Ct. 1983) (D) (L)

City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982) (G) (A)

State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trustees, 108 N.W.2d 288 (Wis.) (G) (L)

Episcopal:

Rector, Wardens, & Members of Bestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (G) (A)

O'Brien v. Chicago, 105 N.E.2d 917 (Ill. App. Ct. 1952) (G) (L)

State v. Cameron, 498 A.2d 1217 (N.J. 1985) (G) (L)

Greentree at Murray Hill Condominiums v. Good Shepherd Episcopalian Church, 550 N.Y.S.2d 981 (Sup. Ct. 1989) (G) (A)

Diocese of Central New York v. Schwarzer, 199 N.Y.S.2d 939 (Sup. Ct. 1960) (G) (L)

Heard v. City of Dallas, 456 S.W.2d 440 (Tex. Civ. App. Ct. 1970) (G) (L)

Lutheran:

Miami Beach Lutheran Church of Epiphany v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955) (D) (L)

Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722 (Ga. Ct. App. 1949) (G) (L)

Bethel Evangelical Lutheran Church v. Village of Morton, 559 N.E.2d 533 (Ill. App. Ct. 1990) (D) (A)

Our Savior's Evangelical Lutheran Church of Naperville v. City of Naperville, 542 N.E.2d 1158 (Ill. App. Ct. 1989) (G) (A)

Schueller v. Board of Adjustment, 95 N.W.2d 731 (Iowa 1959) (G) (L)

Zion Evangelical Lutheran Church v. City of Detroit Lakes, 21 N.W.2d 203 (Minn. 1945) (D) (L)

St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983) (G) (L)

Lutheran in America v. City of New York, 316 N.E.2d 305 (N.Y. 1974) (G) (A)

Synod of Ohio of United Lutheran Church v. Joseph, 39 N.E.2d 515 (Ohio 1942) (G) (L)

Methodist:

West Hartford Methodist Church v. Zoning Board of Appeals, 121 A.2d 640 (Conn. 1956) (D) (A)

Keeling v. Board of Zoning Appeals, 69 N.E.2d 613 (Ind. Ct. App. 1946) (G) (L)

Linden Methodist Episcopal Church v. Linden, 173 A. 593 (N.J. 1934) (G) (L)

Cash v. Brookshire Methodist Church, 573 N.E.2d 692 (Ohio Ct. App. 1988) (G) (A)

First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996) (G) (L)

Pentecostal:

Pentecostal Holiness Church v. Dunn, 27 So. 2d 561 (Ala. 1946) (G) (L)

Presbyterian:

Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994) (G) (A)
Synod of Chesapeake, Inc. v. City of Newark, 254 A.2d 611 (Del. Ch. 1969) (G) (A)
City of Richmond Heights v. Richmond Heights Presbyterian Church, 764 S.W.2d 647 (Mo. 1989) (G) (A)
First Westminister Presbyterian Church v. City Council, 393 N.Y.S.2d 180 (App. Div. 1977) (G) (L)
Westminster Presbyterian Church v. Edgecomb, 189 N.W. 617 (1922) (G) (L)

Minority Denominations:

Assemblies of God:

First Assembly of God v. Collier County, 20 F.3d 419 (11th Cir. 1994) (D) (A)
First Assembly of God v. City of Alexandria, 739 F.2d 942 (4th Cir. 1984) (D) (A)
First Assembly of God v. Collier County, 775 F. Supp. 383 (M.D. Fla. 1991) (D) (A)
Lakeshore Assembly of God Church v. Village Board of Village of Westfield, 508 N.Y.S.2d 819 (App. Div. 1986) (D) (A)

Buddhist:

Moore v. Tribe, 743 F. Supp. 201 (S.D.N.Y. 1990) (G) (A)

Christian Science:

Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 469 N.Y.S.2d 851 (Sup. Ct. 1983) (D) (L)
Mahrt v. First Church of Christ, Scientist, 142 N.E.2d 678 (Ohio Ct. App. 1955) (G) (A)

Church of Christ:

Church of Christ v. Metropolitan Bd. of Zoning Appeals, 371 N.E.2d 1331 (Ind. Ct. App. 1978) (G) (A)

Church of God:

Church of God v. City of Monroe, 404 F. Supp. 175 (M.D. La. 1975) (G) (A)
Jernigan v. Smith, 126 S.E.2d 678 (Ga. 1962) (D) (L)
City of Sherman v. Simms, 183 S.W.2d 415 (Tex. 1944) (D) (L)
State ex rel. Howell v. Meador, 154 S.E. 876 (W. Va. 1930) (G) (L)

Church of Jesus Christ of Latter-day Saints:

Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522 (N.D. Ala. 1990) (G) (L)
Corporation of Presiding Bishop v. City of Porterville, 203 P.2d 823 (Cal. Dist. Ct. App. 1949) (D) (L)
Corporation of Presiding Bishop v. Ashton, 448 P.2d 185 (Idaho 1968) (G) (A)
City of Las Cruces v. Huerta, 692 P.2d 1331 (N.M. Ct. App. 1984) (D) (L)

Eastern Orthodox:

Macedonian Orthodox Church v. Planning Bd., 636 A.2d 96 (N.J. Super. Ct. App. Div. 1994) (D) (L)

Appeal of Russian Orthodox Church of Holy Ghost, 152 A.2d 489 (Pa. 1959) (D) (A)

Evangelical:

State ex rel. Covenant Harbor Bible Camp v. Steinke, 96 N.W.2d 356 (Wis. 1959) (G) (L)

Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654 (D. Minn. 1990) (D) (L)

Hare Krishna:

Marsland v. International Soc'y for Krishna Consciousness, 657 P.2d 1035 (Haw. 1983) (D) (L)

Islam:

Islamic Center v. City of Starkville, 840 F.2d 293 (5th Cir. 1988) (G) (L)

Islamic Soc'y v. Foley, 464 N.Y.S.2d 844 (App. Div. 1983) (G) (L)

Jehovah's Witnesses:

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (D) (L)

Galfas v. City of Atlanta, 193 F.2d 931 (5th Cir. 1952) (D) (L)

Jehovah's Witnesses Assembly Halls v. Jersey City, 597 F. Supp. 972 (D.N.J. 1984) (G) (L)

Matthews v. Board of Supervisors, 21 Cal. Rptr. 914 (Dist. Ct. App. 1962) (D) (L)

Garden Grove Congregation of Jehovah's Witnesses v. Garden Grove, 1 Cal. Rptr. 65 (Dist. Ct. App. 1959) (D) (L)

Redwood City Co. of Jehovah's Witnesses v. City of Menlo Park, 335 P.2d 195 (Cal. Dist. Ct. App. 1959) (G) (L)

Minney v. City of Azusa, 330 P.2d 255 (Cal. Dist. Ct. App. 1958) (D) (L)

State ex rel. Tampa Co. of Jehovah's Witnesses v. City of Tampa, 48 So. 2d 78 (Fla. 1950) (G) (L)

Rogers v. Mayor of Atlanta, 137 S.E.2d 668, 672 (Ga. Ct. App. 1964) (G) (L)

Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals, 182 N.E.2d 722 (Ill. 1962) (G) (L)

Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses, 117 N.E.2d 115 (Ind. 1954) (D) (A)

Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee, 226 N.W.2d 306 (Minn. 1975) (G) (L)

Allendale Congregation of Jehovah's Witnesses v. Grosman, 152 A.2d 569 (N.J. 1959) (D) (L)

Jehovah's Witnesses Assembly Hall of S. New Jersey v. Woolwich Township, 532 A.2d 276 (N.J. Super. Ct. Law Div. 1987) (G) (L)

State ex rel. Wiegel v. Randall, 116 N.E.2d 300 (Ohio 1953) (G) (L)

Libis v. Board of Zoning Appeals, 292 N.E.2d 642 (Ohio Ct. App. 1972) (G) (L)

Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5 (Or. 1958) (D) (L)

Appeal of Trustees of the Congregation of Jehovah's Witnesses, 130 A.2d 240 (Pa. Super. Ct. 1957) (D) (L)

Congregation Comm. N. Fort Worth Congregation, Jehovah's Witnesses v. City Council, 287 S.W.2d 700 (Tex. Civ. App. Ct. 1956) (G) (L)

State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195 (Wash. 1957) (G) (L)

Judaism:

Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983) (D) (L)

Village of Univ. Heights v. Cleveland Jewish Orphan's Home, 20 F.2d 743 (6th Cir. 1927) (G) (L)

Lucas Valley Homeowners Ass'n v. County of Marin, 284 Cal. Rptr. 427 (Ct. App. 1991) (G) (L)

Stoddard v. Edelman, 84 Cal. Rptr. 443 (Ct. App. 1970) (G) (L)

Beit Havurah v. Zoning Board of Appeals, 418 A.2d 82 (Conn. 1979) (G) (A)

Garbaty v. Norwalk Jewish Ctr., Inc., 171 A.2d 197 (Conn. 1961) (G) (L)

Lubavitch Chabad House v. City of Evanston, 445 N.E.2d 343 (Ill. App. Ct. 1982) (G) (L)

Wolbach v. Zoning Bd. of Appeals, 226 N.E.2d 679 (Ill. App. Ct. 1967) (G) (L)

Schwartz v. Congregation Powolei Zeduck, 131 N.E.2d 785 (Ill. App. Ct. 1956) (G) (L)

Congregation Dovid Ben Nuchim v. City of Oak Park, 199 N.W.2d 557 (Mich. Ct. App. 1972) (G) (L)

Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959) (G) (L)

Kali Bari Temple v. Board of Adjustment, 638 A.2d 839 (N.J. Super. Ct. App. Div. 1994) (G) (L)

Lakewood Residents Ass'n v. Congregation Zichron Schneur, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (G) (L)

Farhi v. Commissioners of Borough of Deal, 499 A.2d 559 (N.J. Super. Ct. Law Div. 1985) (G) (L)

Sexton v. Bates, 85 A.2d 833 (N.J. Super. Ct. Law Div. 1951), *aff'd sub nom.*

Sexton v. Essex County Ritualarium, 91 A.2d 162 (N.J. Super. Ct. App. Div. 1952) (D) (L)

Jewish Reconstructionalist Synagogue v. Village of Roslyn Harbor, 342 N.E.2d 534 (N.Y. 1975) (G) (L)

Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. 1968) (G) (A)

Community Synagogue v. Bates, 136 N.E.2d 488 (N.Y. 1956)(G) (L)

Slevin v. Long Island Jewish Medical Ctr., 314 N.Y.S.2d 937 (Sup. Ct. 1971) (G) (A)

Westbury Hebrew Congregation, Inc. v. Downer, 59 Misc. 2d 387 (N.Y. Sup. Ct. 1969) (G) (A)

Westchester Reform Temple v. Griffin, 276 N.Y.S.2d 737 (Sup. Ct. 1966) (D) (A)

Application of Garden City Jewish Center, 155 N.Y.S.2d 523 (Sup. Ct. 1956) (G) (L)

Harrison Orthodox Minyan, Inc. v. Town Board, 552 N.Y.S.2d 434 (App. Div 1990) (G) (L)

Yeshiva and Mesivta Toras Chaim v. Rose, 523 N.Y.S.2d 907 (App. Div. 1989) (D) (L)

Siegert v. Luney, 491 N.Y.S.2d 15 (App. Div. 1985) (G) (A)

North Shore Hebrew Academy v. Wegman, 481 N.Y.S.2d 142 (App. Div. 1984) (G) (A)

Congregation Gates of Prayer v. Board of Appeals, 368 N.Y.S.2d 232 (App. Div. 1975) (D) (L)

Seaford Jewish Ctr., Inc. v. Board of Zoning Appeals, 368 N.Y.S.2d 40 (App. Div. 1975) (G) (L)

Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477 (App. Div. 1974) (D) (A)

Shaffer v. Temple Beth Emeth, 190 N.Y.S. 841 (App. Div. 1921) (G) (A)

Young Israel Org. v. Dworkin, 133 N.E.2d 174 (Ohio Ct. App. 1956) (G) (L)

Overbrook Farms Club v. Zoning Board, 40 A.2d 423 (Pa. 1945) (G) (A)

Appeal of Floersheim, 34 A.2d 62 (Pa. 1943) (G) (A)

Minyan v. Cheltenham Township, 552 A.2d 772 (Pa. Commw. Ct. 1989) (G) (L)

Berlant v. Zoning Hearing Board, 279 A.2d 400 (Pa. Commw. Ct. 1971) (G) (L)

State ex rel. B'Nai B'Rith Foundation v. Walworth Co. Bd. of Adjustment, 208 N.W.2d 113 (Wis. 1973) (G) (L)

Quakers:

Milharcic v. Metropolitan Bd. of Zoning Appeals, 489 N.E.2d 634 (Ind. Ct. App. 1986) (G) (L)

Seventh Day Adventists:

Application of Faith for Today, Inc., 204 N.Y.S.2d 751 (App. Div. 1960) (G) (L)

Unification Church:

New Educ. Dev. Sys. Inc. v. Boitano, 573 F. Supp. 594 (N.D. Cal. 1983) (G) (L)

Holy Spirit Ass'n v. Town of New Castle, 480 F. Supp. 1212 (S.D.N.Y. 1979) (D) (L)

Holy Spirit Ass'n for Unification of World Christianity v. Brush, 469 N.Y.S.2d 196 (App. Div. 1983) (G) (A)

Unitarian:

North Shore Unitarian Soc'y v. Village of Plandome, 109 N.Y.S.2d 803 (Sup. Ct. 1951) (G) (L)

Unitarian Universalist Church v. Shorten, 314 N.Y.S.2d 66 (Sup. Ct. 1970) (G) (A)

Unclassified:

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (G) (L)

Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221 (9th Cir. 1990) (D) (L)

Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (D) (A)

Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991 (D. Colo. 1994) (Alpine Christian Fellowship) (G) (A)

Nichols v. Planning & Zoning Comm'n, 667 F. Supp. 72 (D. Conn. 1987) (G) (L)

Love Church v. City of Evanston, 671 F. Supp. 508 (N.D. Ill. 1987) (D) (L)

Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982) (D) (A)

City of Colorado Springs v. Blanche, 761 P.2d 212 (Colo. 1988) (D) (L)

Grace Community Church v. Town of Bethel, 622 A.2d 591 (Conn. App. Ct. 1993) (G) (L)

Grace Community Church v. Planning Comm'n, 615 A.2d 1092 (Conn. Super. Ct. 1992) (G) (L)

Town v. Reno, 377 So. 2d 648 (Fla. 1979) (Ethiopian Zion Coptic Church) (D) (L)

Pylant v. Orange County, 328 So. 2d 199 (Fla. 1976) (First Apostolic) (D) (L)

State v. Maxwell, 617 P.2d 816 (Haw. 1980) (Hula Hau) (D) (A)

Hope Deliverance Ctr., Inc. v. Zoning Bd. of Appeals, 452 N.E.2d 630 (Ill. App. Ct. 1983) (Non-denominational) (G) (L)

South Side Move of God Church v. Zoning Bd. of Appeals, 365 N.E.2d 118 (Ill. App. Ct. 1977) (D) (A)

Twin-City Bible Church v. Zoning Board of Appeals, 365 N.E.2d 1381 (Ill. App. Ct. 1977) (G) (L)

Coston Chapel A.M.E. Church v. Chaddick, 292 N.E.2d 215 (Ill. App. Ct. 1972) (D) (L)

Family Christian Fellowship v. County of Winnebago, 503 N.E.2d 367 (Ill. App. Ct. 1986) (G) (L)

Board of Zoning Appeals v. New Testament Bible Church, 411 N.E.2d 681 (Ind. Ct. App. 1980) (G) (A)

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No. 95-2074

(31)

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE STATES OF MARYLAND, CONNECTICUT, MASSACHUSETTS, AND NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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35 pp

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, is a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment.

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IN THE

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CITY OF BOERNE, TEXAS,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE STATES OF MARYLAND, CONNECTICUT, MASSACHUSETTS, AND NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The States of Maryland, Connecticut, Massachusetts, and New York, as *amici curiae*, urge the Court to affirm the decision below and to declare the Religious Freedom Restoration Act ("RFRA" or "the Act") constitutional as applied to the States. These *amici* strongly support both the Act and the goal that underlies it, namely, ensuring that governmental entities do not impose burdens on an individual's religious practice unnecessarily or without adequate justification. Pursuing this goal is important to

amici as a matter of policy, not only because it promotes religious freedom generally, but also because it helps ensure that governmental entities do not, inadvertently or otherwise, cross the constitutional dividing line between laws that "prohibit[] the free exercise" of religion (U.S. Const. amend. I) and those that do not. Religion plays an important part in the lives of many citizens, and these *amici* wish to ensure that everyone within their respective States has a full opportunity to practice his or her religion freely, without undue government interference.

At the same time, these *amici*, like the States that have submitted a brief in support of the petitioner, recognize the potential implications of this case for state prerogatives and, more broadly, for the fundamental principles of federalism that govern the interplay between those prerogatives and the authority of the national government. Most obviously, a decision of this Court upholding the Act under a broad reading of Section 5 of the Fourteenth Amendment, such as the alternative rationale articulated in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1996), would give the national government a broad license to intrude into areas that traditionally have been left—and should be left—to the States. On this fundamental issue, then, these *amici* States agree with those States that have chosen to oppose RFRA.

Unlike those States, however, these *amici* believe that RFRA can and should be upheld under a narrower reading of Section 5. The briefs of the respondent and certain of his *amici* have offered alternative interpretations that follow this approach. A decision upholding RFRA, therefore, need not and should not authorize Congress broadly to restrict the range of matters that are left to exclusive state control under our federal system.

On the narrower issue of whether RFRA itself will inevitably thwart the States' ability to carry out their penal, educational, and other core functions, these *amici*

respectfully disagree with the views expressed by the States that have filed in support of petitioner. In the view of *amici,* if RFRA is properly interpreted by this Court and by the lower courts (as it largely has been thus far), that landmark statute will not substantially burden the States' ability to carry out any of these core functions. The principal purpose of this brief is to explain why that is so.

SUMMARY OF ARGUMENT

Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively. This Court has a long established history of providing significant deference to States in matters of prison administration. In light of that history, Congress would have had to express, clearly and unequivocally, its intention to deprive the States of that deference, if it had intended to do that by enacting RFRA. Yet, not only did Congress fail to express such an intention, it instead made clear through RFRA's language and legislative intent that courts should continue to afford deference to the States in matters of prison operation, and in particular, in determining what is necessary to achieve and maintain order, security, discipline and safety in the prisons. Indeed, Congress endorsed and agreed with the deference that courts had been giving to prison officials for years prior to RFRA, whether they applied the traditional compelling interest test or a more relaxed, rational-basis standard such as that adopted by this Court in *Turner* v. *Safley,* 482 U.S. 78 (1987), and *O'Lone* v. *Estate of Shabazz,* 482 U.S. 342 (1987).

It is therefore not surprising that, in construing and applying RFRA's compelling interest test, courts have almost always accorded prison officials the deference that Congress anticipated and, as a result, have rejected most RFRA claims brought by prisoners. Moreover, those claims that have been sustained under RFRA, in general,

have been the types of claims that likely would have been sustained under a rational-basis approach.

If RFRA is properly interpreted and applied to afford appropriate deference to prison administrators, its enforcement should not significantly exacerbate the costs and burdens associated with prisoner litigation and day-to-day prison administration. Although these *amici* might otherwise share the concerns of the *amici* states supporting the petitioner, RFRA should not cause the drastic consequences suggested in their brief. The case law already developed under the statute provides prison officials with a potent arsenal of decisions rejecting a wide variety of meritless claims under RFRA. These decisions can be used as a basis for seeking dismissal of, or summary judgment on, many if not most of the claims litigious prisoners are likely to assert. And, if the improbability of success proves insufficient by itself to deter frivolous claims, statutes such as the recently enacted Prisoner Litigation Reform Act of 1995 should diminish any incentive a prisoner might otherwise have to bring a meritless lawsuit under RFRA.

Nor is there any reason to believe that RFRA has undermined or will undermine the States' ability to manage their educational or public safety functions. For example, virtually all of the education-related cases that have been brought under RFRA have involved only ancillary issues of public education (such as sex education programs, graduations, etc.) and, even then, have been largely unsuccessful. The same is true of lawsuits involving issues of public safety.

In sum, while RFRA properly elevates religious freedom as a fundamental value throughout the Nation, when properly interpreted and applied, the Act does not hamstring the ability of States to perform their essential functions or to provide vital services. To be sure, the nuissance litigation arising out of the statute is an annoy-

ance to all States, but that inconvenience would exist without RFRA and, in any event, does not justify discarding RFRA and the important values underlying it.

ARGUMENT

Amici agree with the States that have joined in support of the petitioner that Section 5 of the Fourteenth Amendment is limited and narrow. However, the Religious Freedom Restoration Act is a valid exercise of Congress's authority under Section 5 under any of the narrow theories articulated in the briefs of the respondent, the United States, and RFRA's congressional sponsors. The Act also is not an unconstitutional attempt on the part of Congress to second-guess the Court as to the meaning of the Free Exercise Clause. Instead, the Act represents a determination by Congress that, assuming this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), identified the maximum reach of the Clause standing alone, a somewhat broader statutory protection was necessary to ensure compliance with the Clause's core requirements. Accordingly, RFRA can and should be sustained without adopting or applying any of the broader theories of Section 5 discussed in the various briefs, including the "substantive" theory, the "ratchet" theory, or the "constitutional values" theory. And, for reasons articulated at length in the briefs filed by the respondent and its other *amici*, RFRA does not run afoul of the Establishment Clause.

Rather than burden this Court with another detailed analysis of the Act's constitutionality, this brief will address RFRA's implications for the management of state penal systems (in Section I below) and other state functions such as education and public safety (in Section II). RFRA has not been—and as long as RFRA is properly interpreted by this Court and the lower courts, it will not be—an undue or unworkable intrusion into state prerogatives.

I. PROPERLY INTERPRETED, RFRA DOES NOT AND WILL NOT UNDERMINE THE STATES' ABILITY TO RUN THEIR PRISONS.

With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems. As demonstrated below, the necessity for such deference is strongly reflected in the case law establishing the well-settled principle that courts must provide significant deference to the States in matters of prison operations, as well as in RFRA's legislative history and in the case law interpreting and applying RFRA's provisions to specific religious-freedom claims. Moreover, as long as the lower courts continue to show appropriate deference to prison officials in addressing RFRA claims, and in applying such statutes as the recent Prison Litigation Reform Act, RFRA will not place undue burdens on State prison authorities.

A. RFRA's Language and Legislative History Require Substantial Deference to the States in Matters of Prison Operations, Including A Recognition that Prison Discipline, Order and Security are Necessarily "Compelling" Governmental Interests.

RFRA's language and legislative history make clear that, at least in the prison context, courts are to continue that tradition and afford significant deference to the States. RFRA provides that the government may not substantially "burden" a person's "free exercise" of religion unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). This language derives from this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and their progeny. The limitations inherent in the requirement of proving a "substantial burden" preserves State authority in many in-

stances where RFRA may be invoked. Although the lower courts, prior to *O'Lone*, disagreed among themselves as to whether the *Sherbert/Yoder* compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgments of prison administrators. In determining, as a statutory matter, that the compelling interest test should apply to religious freedom claims brought by prisoners, Congress evinced its intent—both implicitly in the language of the Act and expressly in the legislative history—to retain in place the deference that courts had traditionally paid to prison officials.

That lower courts applying the traditional *Sherbert/Yoder* approach to prisoners' religion claims (prior to *O'Lone*) would nevertheless give such deference to prison officials is hardly surprising in light of this Court's earlier decisions applying the Free Exercise Clause in the prison context. To be sure, the Court had long held that prisoners do not forfeit their constitutional rights, including those under the First Amendment, during periods of incarceration. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974); *Cruz* v. *Beto*, 405 U.S. 319 (1972) (per curiam). Nevertheless, the Court also had established that incarceration carries with it certain unquestionably permissible limitations on the exercise of a prisoner's constitutional rights, *e.g.*, *Pell*, 417 U.S. at 822-23; *Procunier* v. *Martinez*, 416 U.S. 396, 412-13 (1974), *overruled on other grounds by Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), and that prison officials must be given a great deal of deference in matters of prison administration, even when evaluating prisoners' First Amendment claims. See, *e.g.*, *Bell*, 441 U.S. 520; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (courts must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"); *Wolff* v. *McDon-*

nell, 418 U.S. 539 (1974). In *Pell*, 417 U.S. at 827, this Court made clear that judgments regarding prison security "are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment." See also *Martinez*, 416 U.S. at 412 ("where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities").

Of course, prior to this Court's decisions in *O'Lone* and *Turner*, the lower courts were not consistent as to the standard that should be applied. Some courts applied a lenient balancing approach. See, *e.g.*, *Hill* v. *Blackwell*, 774 F.2d 338, 342-43 (8th Cir. 1985) (prisoner's free exercise claim); *Abdullah* v. *Kinnison*, 769 F.2d 345 (6th Cir. 1985) (same). Others applied a stricter, *Sherbert*-style, compelling interest test. See, *e.g.*, *Murphy* v. *Missouri Dep't of Corrections*, 814 F.2d 1252, 1256 (8th Cir. 1987) (prisoners' free speech and exercise rights); *Bradbury* v. *Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (prisoners' free exercise rights); *Madyun* v. *Franzen*, 704 F.2d 954 (7th Cir. 1983) (same).[1] Even courts that applied the more stringent test in the prison context recognized that they must give substantial deference to prison officials. See *Martinelli* v. *Dugger*, 817 F.2d 1499, 1506 (11th Cir. 1987); *Bradbury*, 718 F.2d at 1532; *Weaver* v. *Jago*, 675 F.2d 116, 119 (6th Cir. 1982); *Vodicka* v. *Phelps*, 624 F.2d 569 (5th Cir. 1980).

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[1] *See also Martinelli* v. *Dugger*, 817 F.2d 1499, 1506 (11th Cir. 1987) (prisoners' free exercise rights); *Weaver* v. *Jago*, 675 F.2d 116, 118-19 (6th Cir. 1982) (same); *Vodicka* v. *Phelps*, 624 F.2d 569, 570-71 (5th Cir. 1980) (prisoner's free speech rights); *Kennedy* v. *Meacham*, 540 F.2d 1057 (10th Cir. 1976) (prisoner's free exercise rights); *Walker* v. *Blackwell*, 411 F.2d 23, 24-25 (5th Cir. 1969) (same); *Barnett* v. *Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969) (same); *Fortune Soc'y* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970) (prisoners' free speech rights); *Udey* v. *Kastner*, 805 F.2d 1218, 1219 n.1 (5th Cir. 1986) ("[w]e note that there is an intercircuit conflict on the appropriate standard for free exercise claims in a prison context").

This deference applied at two distinct levels. First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security and discipline are paramount government interests. See, *e.g.*, *Martinelli*, 817 F.2d at 1506; *Bradbury*, 718 F.2d at 1543. Second, those courts recognized that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue. *Martinelli*, 817 F.2d at 1506; *Bradbury*, 718 F.2d at 1543; *Weaver*, 675 F.2d at 118-19. In short, pre-*O'Lone* decisions, including those applying a *Sherbert*-style compelling interest test, accorded prison officials substantial deference at *both* steps of the *Sherbert* inquiry. See *Martinelli*, 817 F.2d at 1506 ("[t]his two-part standard should be applied with a wide-ranging deference to the expert judgment of prison administrators"); *Bradbury*, 718 F.2d at 1543 (same); see also *Weaver*, 675 F.2d at 118-19; *Vodicka*, 624 F.2d at 574.

The conflict regarding the proper standard for prisoners' First Amendment claims ultimately was resolved by the Court in *Turner* and *O'Lone*, which held that First Amendment claims by prisoners must be evaluated under a reasonable relationship standard rather than a compelling interest standard. In *O'Lone*, moreover, the Court once again emphasized that great deference must be given to those " 'who are actually charged with and trained in the running of the particular institution under examination.' " *O'Lone*, 482 U.S. at 349 (quoting *Bell*, 441 U.S. at 562).

In short, by the time RFRA was enacted, prior decisions of this Court and the lower courts firmly established the requirement that courts afford great deference to the views of prison officials, no matter what standard the courts apply to the prison regulation at issue. Although RFRA adopted—as a statutory matter—a stricter substantive standard than this Court ultimately was willing to adopt as a constitutional matter, Congress plainly agreed with

the Court on the importance of deference to prison officials. Indeed, in adopting the *Sherbert* test as the statutory standard for assessing prisoners' religious-freedom claims, Congress necessarily was adopting by implication the prior judicial directive that courts provide such deference in resolving those claims See, *e.g., Molzof* v. *United States,* 502 U.S. 301 (1992) (when term of art adopted in statute, term should be construed in accordance with its accepted meaning unless legislature indicates otherwise) (citing cases); *McDermott Int'l, Inc.* v. *Wilander,* 498 U.S. 337 (1991) (same).

In fact, if Congress intended to change the well-established concept that courts are to provide great deference to States in matters of prison administration, Congress would have had to express that intention clearly and unequivocally. As this Court stated in *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991), "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460-61 (quoting *Atascadero State Hosp.* v. *Scanlon,* 473 US. 234, 242 (1985)) (internal quotation marks omitted). Abandoning the tradition of deference to state prison officials would certainly alter that balance. Accord *Torcasio* v. *Murray,* 57 F.3d 1340, 1346 (4th Cir. 1995) ("[b]ecause the management of state prisons implicates 'decision[s] of the most fundamental sort for a sovereign entity,' Congress must speak unequivocally before [the court] will conclude" that Congress intended to change the balance between state and federal powers on prison-related issues) (quoting *Gregory,* 501 U.S. at 460, *cert. denied sub nom. Torcasio* v. *Angelone,* 116 S. Ct. 772 (1996)).

Congress not only failed to express an intention to take away the deference that was traditionally provided to the States, but explicitly declared an intention to the contrary.

For example, in its report on RFRA, the Senate Judiciary Committee stated:

> The Committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources.

S. Rep. No. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899-1900. And Senator Hatch expressly noted, without any disagreement from his colleagues, that "order, safety, and discipline" are compelling governmental interests in the prison context. 139 Cong. Rec. S14364 (daily ed. Oct. 26, 1993); see also 139 Cong. Rec. S14466 (daily ed. Oct. 27, 1993) (statement of Sen. Hatfield) ("[a]ctivities that are dangerous or jeopardize discipline would still be subject to restriction under the compelling interest standard"); S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1900.

The conclusion that RFRA requires substantial deference to the judgments of prison officials finds further support in the history of a proposed amendment to RFRA, the Reid Amendment, that would have excluded prisoner claims from the Act's protection altogether The legislative history makes clear that, in rejecting this amendment, Congress did not intend to deprive prison officials of the deference they had received in the past. Instead, Congress intended to limit the possible effects of RFRA on prison management by defining "compelling interest" so that prison officials would almost always be able to justify prison regulations. See Abbott Cooper, "Dam the RFRA at the Prison Gate: The Religious Freedom Restoration

Act's Impact on Correctional Litigation," 56 Mont. L. Rev. 325, 333 (1995). Thus, the Senate Report stated:

> The committee is confident that the compelling interest standard established . . . in the Act will not place undue burdens on prison authorities. Instead, it reestablishes a standard that is flexible enough to serve the unique governmental interests implicated in the prison context. Accordingly, the committee finds that application of the act to prisoner-free exercise claims will provide a workable balancing of the legitimate interests of prison administrators with the Nation's tradition of protecting the free exercise of religion.

S. Rep. No. 103-111, at 11, 1993 U.S.C.C.A.N. at 1900.

Indeed, during the congressional proceedings, many prison and law-enforcement officials recognized that, even without the Reid Amendment, RFRA would preserve the deference they traditionally had been afforded, both by this Court and by the lower federal courts. Thus, although some state Attorneys General submitted a letter in support of the amendment, other state Attorneys General and the United States Attorney General submitted letters opposing the Amendment, in part on the ground that prison officials would continue to receive great deference under the new statute in any event. 139 Cong. Rec. S14351-52 (daily ed. Oct. 26, 1993). As Attorney General Reno wrote:

> Certainly, the strong interest that prison administrators and society in general have in preserving security, order, and discipline in prison will receive great weight in the determination whether the government meets the compelling interest test when there is a claim that exercise of religious rights is burdened and whether it has pursued the least restrictive means of doing so.

Id. at S14351.

In sum, RFRA's language and legislative history reflect and reinforce the longstanding judicial tradition that prison

officials be accorded great deference in determining what is necessary for maintaining order, safety, security and discipline in their prisons. Thus, on paper, RFRA provides no substantial impediment to the effective administration of prisons by the States or by the United States. What is more, as *amici* now show, in practice RFRA has not unduly disrupted the States in their efforts to maintain effective penal institutions while recognizing the legitimate religious freedom claims of prisoners.

B. In Practice, Courts Have Typically Accorded Great Deference to Prison Officials When Applying RFRA to Prisoners' Claims, and Have Interpreted the Requirements of RFRA Narrowly as Applied to Prisoners.

If the courts refused to accord deference to prison officials as required under RFRA, *amici* certainly would be concerned. For the most part, however, the lower court have heeded Congress's directive to afford prison officials significant deference when deciding claims brought by prisoners under RFRA. In such cases, the government interest is almost always found compelling, and the challenged rule is far more often than not found to be an adequately tailored means of promoting that interest. As a result, when properly applied, RFRA has not had any significant adverse effect on the States' ability to ensure discipline and order in their prisons.

Many decisions have expressly recognized that the Act requires the courts to give great deference to prison officials. In *Ochs* v. *Thalacker*, 90 F.3d 293 (8th Cir 1996), for example, the Eighth Circuit observed that RFRA's "legislative history urges courts to 'continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs

and limited resources.'" *Id.* at 296 (quoting S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1900).[2]

Similarly, in *Hamilton* v. *Schriro*, 74 F.3d 1545, 1554 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996), the same court observed that "both pre-*O'Lone* Supreme Court case law and the relevant legislative history indicate that a court applying RFRA must give due deference to the expertise of prison officials in establishing regulations to maintain prison safety and security, even when the court applies a 'heightened' standard of review." After reviewing the history of this Court's, and the lower courts', treatment of prisoners' First Amendment claims, as well as RFRA's legislative history, the court concluded that "the necessity for courts to continue deferring to the judgment of prison officials" remains even under RFRA. *Id.*

Accordingly, in cases in which courts have reached the compelling interest and tailoring analyses,[3] they have

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[2] In *Ochs*, 90 F.3d at 295, the Eighth Circuit rejected a prisoner's request to be racially segregated. The court questioned the sincerity of the inmate's religious views and whether a sincere religious belief was "substantially burdened," but did not decide the case on those grounds. *Id.* at 296. Instead, the Court noted that it "must give great deference to these penological judgments regarding security" and held that the refusal to segregate racially the inmate was done "to further the most compelling government interest in a prison setting, institutional security." *Id.* at 297. The court also indicated that the prison officials "believe that random cell assignments lessen racial tension and promote security, and that no less restrictive policy can meet their security objectives." *Id.* at 296.

[3] In many cases, the courts have not even reached the compelling interest or the least restrictive means analyses because they first concluded that the inmates failed to satisfy the threshold requirement of proving a "substantial burden" on their free exercise rights. *See, e.g.*, *Bryant* v. *Gomez*, 46 F.3d 948 (9th Cir. 1995) (inmate failed to demonstrate that prison's refusal to hold full Pentecostal services substantially burdens his faith); *Diaz* v. *Collins*, 872 F. Supp. 353, 359-60 (E.D. Tex. 1994) (stipulations on obtaining medical pouch did not substantially burden inmate's free exercise rights); *Levinson-Roth* v. *Parries*, 872 F. Supp. 1439

most often concluded that there was no violation of RFRA because the government's interest was sufficiently compelling and the means chosen were permissible. See, *e.g.*, *Diaz* v. *Collins*, 872 F. Supp. 353, 358-59 (E.D. Tex. 1994) (hair length requirement did not violate RFRA); *Fawaad* v. *Herring*, 874 F. Supp. 350 (N.D. Ala. 1995) (prison requirement that inmate use "committed" name as well as religious name on all mail was not a violation of RFRA), *aff'd*, 81 F.3d 1084 (11th Cir. 1996); *George* v. *Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (denial of access to materials that fostered racial animosity not a violation of RFRA). Indeed, the courts have uniformly recognized that, "[i]n the prison context, compelling government interests include orderly and safe operation of prisons." *Rust* v. *Clarke*, 883 F. Supp. 1293 (D. Neb. 1995), *aff'd without op.*, 89 F.3d 841 (8th Cir.), *cert. denied*, 117 S. Ct. 398 (1996). See also *Woods* v. *Evatt*, 876 F. Supp. 756 (D.S.C.), *aff'd*, 68 F.3d 463 (4th Cir. 1995); *Muslim* v. *Frame*, 891 F. Supp. 226, 232. (E.D. Pa. 1995) (citing statement of Senator Hatch during RFRA debate that " 'order, safety, security and discipline' are compelling governmental interests in the prison context").

The courts have relied for this conclusion, not only on RFRA's legislative history, but also on this Court's pre-RFRA (and pre-*O'Lone*) decisions such as *Bell* v.

(D. Md. 1995) (requiring inmate to remove wig for identification picture did not substantially burden her free exercise rights); *Woods* v. *Evatt*, 876 F. Supp. 756 (D.S.C.) (conducting Muslim service in multipurpose building and requirement that prisoners register as Muslims before permitted to attend Muslim service did not substantially burden inmate's free exercise rights), *aff'd*, 68 F.3d 463 (4th Cir. 1995); *Crosley-El* v. *Berge*, 896 F. Supp. 885 (E.D. Wis. 1995) (conducting only a general Muslim religious service and not a separate Moorish service did not substantially burden inmate's free exercise rights). Like all litigation, these claims sap the resources of the State. Nevertheless, it is not reasonable to include such claims as part of the costs to the States of RFRA because they almost certainly would have been pursued without RFRA and their proper disposition was not affected by the Act.

Wolfish, 441 U.S. 520 (1979); see *id.* at 520-21, 544-48, and to prior lower court decisions that found prison security, discipline and administration "compelling interests by definition," see *George*, 896 F. Supp. at 898 (acknowledging that this Court has "repeatedly recognized that prison officials are better situated than judges to evaluate penological objectives" and that "there can be no argument that there is a compelling state interest in the security of the [prison]"); *Rust*, 883 F. Supp at 1306-07; *Frame*, 891 F. Supp. at 232 ("the government's interest in creating safe prisons certainly qualifies as a compelling interest;" " 'institutional considerations of internal security within the corrections facilities' are 'central to all other corrections goals' ") (quoting *Pell*, 417 U.S. at 822). In short, courts interpreting RFRA have been extremely (and appropriately) deferential to prison authorities as to what constitutes a compelling interest. See Daniel J. Solove, Note, "Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons," 106 Yale L.J. 459, 474-86 (1996) (arguing that courts have not been sufficiently skeptical of the government's interests and policies under RFRA).

In applying RFRA's tailoring requirement, courts have likewise accorded great deference to prison officials in determining whether the regulation at issue is sufficiently tailored to the State's objective. See *Jolly* v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996); *Ochs*, 90 F.3d at 296-97; *Hamilton*, 74 F.3d at 1554, 1556; *George*, 896 F. Supp. at 898. Courts have acknowledged that

> It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA. Moreover, such an onerous requirement would be irreconcilable with the well-established principle, recognized by the Supreme Court and RFRA's legislative history, that prison administrators must be accorded due deference in creating regulations and policies directed at the maintenance of prison safety and security.

Hamilton, 74 F.3d at 1556. Here, too, the courts have looked not only to RFRA's legislative history, but also to this Court's pre-RFRA (and pre-*O'Lone*) decisions in case such as *Bell*. See *Jolly*, 76 F.3d at 475-76; *Ochs*, 90 F.3d at 297; *Hamilton*, 74 F.3d at 1553; *George*, 896 F. Supp. at 898.

To be sure, prisoners have won some limited victories under RFRA. But those results might have been no different prior to RFRA, even under this Court's decisions in *O'Lone* and *Turner*. For example, in *Muslim* v. *Frame*, 891 F. Supp. 226 (E.D. Pa. 1995), the court denied the government's motion for summary judgment on a prisoner's RFRA claim regarding the wearing of a particular head gear on the ground that, in that case, prison officials had failed to establish that allowing a religious head gear would unduly increase administrative costs, permit a means of expressing gang affiliation or impede a need to visually identify prisoners. Yet a similar claim produced the same result in *Conley* v. *Branston*, No. 87-3692, 1988 WL 61509 (6th Cir. June 13, 1988) (unpublished op.) (per curiam) (reversing grant of summary judgment on prisoner's free exercise claim relating to the wearing of a headband), which was decided after *O'Lone* and prior to RFRA's enactment. In another case, the court in *Luckette* v. *Lewis*, 883 F. Supp. 471 (D. Ariz. 1995), held that a prisoner's request to maintain a beard of not more than one-quarter inch did not raise compelling safety concerns under RFRA. Yet, at least one court had reached a similar conclusion in another post-*O'Lone*, pre-RFRA case. See *Mosier* v. *Maynard*, 937 F.2d 1521 (10th Cir. 1991) (summary judgment denied on prisoner's free exercise claim regarding hair grooming).

Similarly, the plaintiffs in *Sasnett* v. *Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3370 (U.S. Oct. 29, 1996) (No. 96-710), won a preliminary injunction preventing the application of a regulation banning the wearing of religious jewelry in prison until a final decision on the merits was made. But the plaintiff

in a case decided under the *O'Lone* standard also obtained a preliminary victory on a similar issue. See *Street* v. *Maloney*, No. 92-1822, 1993 WL 125396 (1st Cir. Apr. 23, 1993) (unpublished op.) (reversing summary judgment for prison officials on prisoner's challenge to confiscation of Hindu prayer bears).

As these cases demonstrate, the mere fact that prisoners win a few victories under RFRA need not signal a radical departure from the deference afforded to prison officials prior to RFRA. In any event, this Court and other appellate courts around the country obviously can correct any excesses committed at the trial court level.

In the view of the States that join as *amici* herein, this analysis places in proper context the "parade of horribles" showcased by the *Amici* States in support of the petitioner. *Amici* Brief at 4-5 (citing cases). Many of the prisoner claims discussed by those States are, indeed, ridiculous. What is telling, however, is that each of those claims—for racial segregation, permission to distribute hate literature, permission to distribute drugs, the right to burn bibles, the right to obtain swords, etc.—was *rejected* by the courts under RFRA. Consistent with RFRA's language and legislative history, those decisions reflect the proper understanding that prison administrators are entitled to substantial deference as to both "compelling interest" and what constitutes the "least restrictive means" of furthering that interest.

C. Properly Interpreted by the Courts to Grant Appropriate Deference to Prison Administrators, RFRA Should Not Impose Undue Additional Costs or Intrusion Upon the States.

If, as the Senate Judiciary Committee anticipated, "the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators," see S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1900, RFRA should not visit undue costs or intrusion upon the administration of prisons.

The States supporting the petitioner argue that the Act unduly burdens States because "RFRA lawsuits are expensive." *Amici* Brief at 3. That argument would have validity only if courts misapplied RFRA.

Doubtless, some lower courts have failed to afford the appropriate deference to prison administrators under RFRA, and such cases have resulted in increased costs of litigation and compliance. As shown above, however, most courts applying RFRA in the prison context have accorded administrators the "wide-ranging deference" that this Court sanctioned in *Bell*, 441 U.S. at 547, and recently reaffirmed in *Lewis* v. *Casey*, 116 S. Ct. 2174, 2185, 2198 (1996) (quoting *Bell* with approval in both the majority opinion and the concurrence of Justice Thomas). See, *e.g.*, *Ochs*, 90 F.3d at 296; *Hamilton*, 74 F.3d at 1554-55. See also *supra* pp. 7-8. To the extent the Court in the present case considers the issue of RFRA's application in the prison context, the Court should recognize that the lower court decisions providing deference to prison administrators have interpreted and applied RFRA correctly.

Even granting that, if applied improperly, RFRA could be expensive and intrusive to the States, the *Amici* States supporting the petitioner overlook three important considerations. First, religious freedom cases would impose significant costs on the States with or without RFRA. Although it is true that a large number of cases brought under RFRA have been by prisoners, prisoners brought numerous religious freedom challenges before RFRA was enacted as well. Certainly, the abundance of prisoner lawsuits is a burden on State governments, but that burden is not new, and did not result from RFRA. Similarly, although prison officials face significant challenges every day in attempting to accommodate prisoners' religious practices, with many of the issues never even reaching the courts, that administrative burden would exist regardless of RFRA.

Likewise, although a number of the prisoners' claims under RFRA have been meritless, many of the pre-RFRA religious freedom challenges by prisoners were meritless as well.[4] As Attorney General Reno wrote in opposition to the Reid Amendment:

> Prisons had operated under Sherbert for a number of years before O'Lone and Turner adopted a standard that is plainly less accommodating to the prisoners' exercise of religious rights. During that period, prisoners attempted to gain privileges based on fabricated free exercise claims. Not surprisingly, those types of claims have continued even under the standard of O'Lone and Turner. They will doubtless continue whether [RFRA] becomes law or not.

139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993).

In any event, as the Judiciary Committee anticipated, courts have been able to discern and reject sham Free Exercise claims that are, in fact, "designed primarily to obtain special privileges." S. Rep. No. 103-111, at 10-11, 1993 U.S.C.C.A.N. at 1899-1900. In such cases, courts have rejected the claims outright by applying the threshold substantial burden test, without even reaching the compelling interest/narrow tailoring tests. Thus, Senator Hatch was correct when he stated that "our courts are well suited to detect the abusive tendencies of our litigious prisoners," and his hope that "the courts will continue to reject these abusive claims. . . . [and that] the courts will continue to deny protection to prisoners involved in

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[4] For example, in *Green* v. *White*, 525 F. Supp. 81 (E.D. Mo. 1981), *aff'd*, 693 F.2d 45 (8th Cir. 1982), the court three times dismissed the claims of a prisoner, the spiritual leader of the Human Awareness Life Church, for various privileges, including conjugal visits, banquets on designated church holidays and payment for services as chaplain of his church. The court dismissed the prisoner's lawsuit, recognizing "the complete and total insincerity of plaintiff and his litigious pursuits" and noting that "[i]t was readily apparent to any objective observer that [plaintiff] viewed the proceedings in this Court as a joke." *Id.* at 85.

this deceitful activity" has come true. 139 Cong. Rec. S14362 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

Second, the arguments by the petitioner and its *amici* fail to recognize that much of the litigation cost to the States results from the fact that RFRA is a relatively new statute, and that those additional costs soon will be reduced greatly as the body of precedent favorable to States under RFRA develops. Already, in the few years since RFRA was enacted, a fairly substantial body of case law has established, among other things, that a prisoner's religious beliefs do not entitle him or her to:

- Obtain access to materials that foster racial animosity. *George* v. *Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995); *Reimann* v. *Murphy*, 897 F. Supp. 398 (E.D. Wis. 1995); *Haff* v. *Cooke*, 923 F. Supp. 1104 (E.D. Wis. 1996).
- Live in racially segregated quarters. *Ochs* v. *Thalacker*, 90 F.3d 293, 295-96 (8th Cir. 1996); *Winters* v. *State*, 549 N.W.2d 819 (Iowa 1996).
- Be excluded from mandatory testing for various diseases. *Rhinehart* v. *Gomez*, No. 93-CV-3747, 1995 WL 364339 (N.D. Cal. June 8, 1995); but see *Jolly* v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996).
- Choose a prison with better quality religious services or religiously prepared (*e.g.*, kosher) food. *Prins* v. *Coughlin*, 76 F.3d 504 (2d Cir. 1996).
- Attend religious services without first signing up to attend. *Shaheed* v. *Winston*, 885 F. Supp. 861 (E.D. Va. 1995).
- Attend religious services designed for a particular sect within a broader denomination, where the prison already offers services designed for the entire denomination. *Crosley-El* v. *Berge*, 896 F. Supp. 885 (E.D. Wis. 1995) (no right to attend Moorish Science Temple services separate from general "Islamic" services); *Bryant* v. *Gomez*, 46 F.3d

948 (9th Cir. 1995) (inmate failed to demonstrate that prison's refusal to hold full Pentecostal services substantially burdens his faith); see also *Blair-Bey* v. *Nix*, 963 F.2d 162, 163 (8th Cir. 1992) (religious advisor need not be provided for particular sect of Islamic religion).

- Wear religious clothing particular to a specific sect within a broader denomination. *Akbar-El* v. *Muhammed*, 663 N.E.2d 703 (Ohio Ct. App. 1995) (no right to wear a "fez" rather than an officially sanctioned "tarbush" for Islamic services).
- Wear long hair or a wig. *Hamilton* v. *Schriro*, 74 F.3d 1545 (8th Cir. 1996); *Diaz* v. *Collins*, 872 F. Supp. 353 (E.D. Tex. 1994); *Phipps* v. *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *May* v. *Baldwin*, 895 F. Supp. 1398 (D. Or. 1995); *Levinson-Roth* v. *Parries*, 872 F. Supp. 1439 (D. Md. 1995).

The ever-growing list of requested privileges to which prisoners are *not* entitled under RFRA provides courts with precedent that will undoubtedly make future cases even easier to handle. Courts that address similar issues in the future properly will reject such claims in response to motions to dismiss, or certainly in response to summary judgment motions, at least in part based on these earlier rulings.[5]

Third, in any event, the argument with respect to the States' litigation burden ignores the additional limitations that Congress recently has placed on prisoner lawsuits in the Prison Litigation Reform Act of 1995, Pub. L. No.

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[5] Already, courts have granted summary judgment on the grounds that the inmate's free exercise rights have not been substantially burdened. *See, e.g., Crosley-El*, 896 F. Supp. at 889; *Woods*, 876 F. Supp. at 756. Similarly, courts have started to find as a matter of law that the governmental interests are compelling, *see, e.g., Frame*, 891 F. Supp. at 232, and that the means chosen by the State were the least restrictive alternatives, *see, e.g., George*, 896 F. Supp. at 898.

104-134, Title VIII, §§ 801-810, 110 Stat. 1321-66 to 1327-77 (1996). That legislation provides that a prisoner bringing a civil action on an *in forma pauperis* basis nevertheless must pay the full amount of the filing fee, and provides the mechanism by which the court can enforce this requirement against the prisoner. See *id.*, § 804. The legislation further provides that, for any claim brought by a prisoner against a government entity or employee thereof, the court should "before docketing, if feasible, or, in any event, as soon as practicable after docketing, . . . dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." *Id.*, § 805. Moreover, the legislation provides that no prisoner may bring a civil action on an *in forma pauperis* basis if the prisoner has previously brought three actions found to be frivolous, malicious or failing to state a claim. See *id.*, § 804.

Perhaps most important, the legislation provides that release credit, *i.e.*, "good time," earned by a prisoner may be revoked if a court finds that the prisoner has brought a civil action and "(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or otherwise presents false evidence or information to the court." *Id.*, § 809.

This legislation thus provides an additional means of ensuring that prisoners are not able to bog down the justice system and burden the States with meritless claims under RFRA or any other authority. Prisoners certainly will become more hesitant to file frivolous or malicious claims when they realize they will have to pay filing fees, that the claims may be dismissed even before they are docketed, and that they may lose earned release credits if a court finds that the claims were made maliciously—as

a court is likely to do if the prisoner brings a claim under RFRA that has already been rejected.

In sum, as long as the courts interpret RFRA in a manner that affords appropriate deference to prison officials, there is no good reason to believe that RFRA either will interfere with the States' ability to administer their prisons, or will increase the cost of responding to prisoner litigation. The States joining this brief share completely the desire of those States supporting the petitioner to ensure that prison administration is not undermined by RFRA or that undue resources are not devoted to defending senseless litigation involving meritless assertions of religious freedom. Where we part company with our sister States is on the issue of whether those objectives can be preserved under RFRA. We believe they can, and in any event, the record to date simply does not reveal the kind of untoward effects on States that would justify abandoning the core value of promoting religious freedom.

II. RFRA DOES NOT IMPEDE THE STATES' ABILITY TO MANAGE THEIR EDUCATIONAL OR PUBLIC SAFETY FUNCTIONS.

The States supporting the petitioner properly identify prisoner actions as the primary source of concern arising out of RFRA, and these *amici* believe the above discussion adequately addresses that common concern. To a lesser extent those States also express some anxiety about the impact of RFRA on the administration of their educational, public safety and other core functions. Again, the States joining this brief could not more strongly agree that these are matters of fundamental importance and that they must guide the proper interpretation of RFRA. However, as shown below, the valid interests of the States can be accommodated within the statutory framework. Accordingly, the argument for jettisoning RFRA on radical constitutional grounds cannot be supported by reference to argument based on the need to protect State policymaking prerogatives.

Although there have been a number of cases under RFRA relating to education, the cases reveal no interference with the States' ability to provide public education effectively and efficiently. In fact, plaintiffs have lost many of the cases challenging education-related regulations or practices.[6] Remarkably, in none of the cases cited by the *Amici* States in support of the petitioner, was a violation of RFRA found.[7] *Amici* Brief at 6. Moreover, the education cases under RFRA have involved issues that were tangential to the State's core mission in providing public education to children; none has even challenged a regulation the invalidation of which would interfere in any significant way with any State's ability to operate its public education system.

Similarly, although some of the claims made under RFRA arguably are related to issues of "public safety," none of those cases has created any new rights or allowed plaintiffs any special privileges. As with the education cases, not one of the public safety cases cited by the States in support of the petitioner found a violation of RFRA.[8] *Amici* Brief at 7. Thus, the courts properly

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[6] See, *e.g.*, *Bauchman* v. *West High Sch.*, 900 F. Supp. 254 (D. Utah 1995) (Jewish student's challenges to various practices at her public school, including singing religious songs at graduation, dismissed); *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995), (high school students' challenges to requirement that they attend AIDS/sex education program at public school dismissed), *cert. denied*, 116 S. Ct. 1044 (1996); *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995) (no violation in refusal to provide hearing-impaired child with cued speech translator in his private sectarian school), *cert. denied*, 116 S. Ct. 706 (1996).

[7] In each of the cited cases except one, the plaintiff's claim was rejected. In the exception, *Cheema* v. *Thompson*, 67 F.3d 883, 886 (9th Cir. 1995), the plaintiff merely won a preliminary injunction effective until a decision on the merits was reached; the court did not find a violation of RFRA.

[8] For example, in *State* v. *Bontrager*, No. 6-95-16, 1996 WL 612397 (Ohio Ct. App. Oct. 18, 1996) (unpublished op.), the defendant was convicted of violating the criminal code for deer

have recognized that RFRA is not a vehicle by which to interfere significantly with the States' ability to address issues of public safety, and there is no reason to assume that the courts will do so in the future.

Finally, RFRA has not created burdensome problems for the States on land-use issues. The States supporting the petitioner cite only one case involving a land-use issue, and the plaintiffs' RFRA claim in that case was rejected.[9] *Amici* Brief at 7. Courts have rejected the RFRA claims in other land-use cases decided under RFRA as well.[10] And the few land-use claims under

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hunting while not wearing a "hunter orange" colored hat, cap, vest or jacket. The defendant, a member of the Old Order Amish faith, claimed that enforcement of that law against him would violate his rights under the United States and Ohio constitutions. On appeal, the court affirmed the conviction, and found that the statute violated neither the state constitution nor federal law under either *Smith* or RFRA. *Id.* at *6-*7; *see also Osborne* v. *Power*, 890 S.W.2d 570 (Ark. 1994) (no violation of RFRA in finding that massive display of Christmas lights on private home was a nuisance that must be abated). In the one case cited by the States supporting the petitioner in which the court found a constitutional violation, the court concluded that the challenged statute violated the state constitution as applied in the case and on that basis declined even to address the applicability of RFRA. *State* v. *Miller*, 549 N.W.2d 235 (Wis. 1996).

[9] In *Thiry* v. *Carlson*, 78 F.3d 1491, 1494-96 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 78 (1996), the plaintiffs claimed that a proposed condemnation of a portion of their property violated RFRA because that poriton of their property contained the gravesite of their stillborn daughter. The court found no substantial burden on their exercise of religion and, therefore, no violation of RFRA. *Id.* at 1495-96.

[10] *See, e.g., Daytona Rescue Mission, Inc.* v. *City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (denial of mission's application to operate shelter and food bank not a substantial burden under RFRA); *Germantown Seventh Day Adventist Church* v. *City of Philadelphia*, No. CIV.A. 94-1633, 1994 U.S. Dist. LEXIS 12163 (E.D. Pa. Aug. 26, 1994) (no showing that zoning restrictions caused substantial burden on religious freedom).

RFRA that have succeeded do not involve issues that will interfere in any substantial way with a State's ability to regulate land-use matters.[11]

In sum, any argument that RFRA will seriously impede the States' ability to carry out their educational, public-safety, land-use, and other functions rests on unfounded speculation and hyperbole. The growing body of case law under RFRA demonstrates that the States have rarely even been faced with significant *challenges* to their ability to carry out those core functions, much less court decisions that threaten those functions in any significant way.

Given that this is a brief filed on behalf of States, it bears repeating that *amici* share the underlying concerns of those States that have joined in support of the petitioner. Like those States, the States here are wary of any federal legislation that interferes with our ability to perform core functions, such as operating prisons, schools and other institutions efficiently and effectively. But fear and suspicion are no substitute for a reasoned and honest assessment of the costs and benefits of a particular federal enactment.

Such an assessment of RFRA demonstrates that the Act protects religious freedom, which the *amici* States joining this brief recognize as fundamentally important, and does so without interfering significantly with the States' prerogatives in furthering their important missions. Thus, *amici* remain committed to ensuring that Congress does not run afoul of the limits on its authority under the Fourteenth Amendment and elsewhere in the

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[11] *See, e.g., Western Presbyterian Church* v. *Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994) (summary judgment and permanent injunction for church that wanted to feed the homeless; city had not demonstrated a compelling interest); *Jesus Center* v. *Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (violation of RFRA in not permitting church to operate homeless shelter; interest compelling but means not least restricitve).

Constitution. But whatever those limits are, they are not exceeded by the measured effort to enforce religious freedom embodied in RFRA.

CONCLUSION

For the foregoing reasons, these *Amici* States respectfully request that this Court affirm the decision of the Court of Appeals.

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January 10, 1997

No. 95-2074

(32)

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

CITY OF BOERNE, TEXAS,

Petitioner,

—versus—

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

—and—

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FREE EXERCISE OF RELIGION IN SUPPORT OF RESPONDENTS

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CERTIFICATE OF INTEREST

The undersigned, counsel of record for the *amici*, furnishes the following list pursuant to U.S. Sup.Ct. R. 26.6:

COALITION FOR THE FREE EXERCISE OF RELIGION

All of the members of the Coalition are corporations, and have no parents or subsidiaries, except as indicated below.

Agudath Israel of America
Aleph Institute
American Association of Christian Schools
American Baptist Churches USA
American Civil Liberties Union
American Conference on Religious Movements
American Ethical Union, Washington Ethical Action Office
American Humanist Association
American Jewish Committee
American Jewish Congress
American Muslim Council
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church & State
Anti-Defamation League
Association of Christian Schools International
Association on American Indian Affairs
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Christian Church (Disciples of Christ)
Christian Life Commission, Southern Baptist Convention
Christian Science Committee on Publication*
Church of Jesus Christ of Latter-day Saints
Church of the Brethren
Church of Scientology International

Certificate of Interest (Cont'd)

Coalition for Christian Colleges and Universities
Coalitions for America
Concerned Women for America
Council of Jewish Federations
Council on Religious Freedom
Council on Spiritual Practices
Criminal Justice Policy Foundation
Episcopal Church
Evangelical Lutheran Church In America
Federation of Reconstructionist Congregations and Havurot
Friends Committee on National Legislation
General Conference of Seventh-day Adventists*
Guru Gobind Singh Foundation****
Hadassah, the Women's Zionist Organization of America, Inc.
Home School Legal Defense Association
International Association of Jewish Lawyers and Jurists
International Institute for Religious Freedom
Japanese American Citizens League
Jewish Reconstructionist Federation
Justice Fellowship
Liberty Counsel
Mennonite Central Committee U.S.**
Muslim Prison Foundation
Mystic Temple of Light, Inc.
National Association of Evangelicals
National Campaign for a Peace Tax Fund
National Committee for Public Education and Religious Liberty
National Council of Churches of Christ in the USA
National Council of Jewish Women
National Federation of Temple Sisterhoods
National Jewish Commission on Law and Public Affairs
National Jewish Community Relations Advisory Council
National Sikh Center

Certificate of Interest (Cont'd)

Native American Church of North America
Native American Rights Fund
North American Council for Muslim Women
People For the American Way Action Fund
Peyote Way Church of God
Presbyterian Church (USA), Washington Office
Rabbinical Council of America
Sacred Sites Inter-faith Alliance
Soka-Gakkai International - USA
Traditional Values Coalition
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
Unitarian Universalist Association of Congregations
United Church of Christ, Office for Church in Society***
United Methodist Church, Board of Church & Society
United Synagogue of Conservative Judaism

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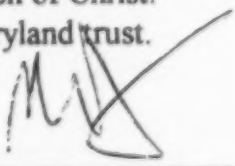
* Unincorporated association.

** The Mennonite Central Committee, U.S. is a part of the Mennonite Central Committee, Inc.

*** The parent organization of the Office for Church in Society is the Executive Council of the General Synod of the United Church of Christ.

**** Organized as a Maryland trust.



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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INTEREST OF THE *AMICI*

The Coalition for the Free Exercise of Religion ("Coalition") is a coalition of over sixty religious and civil liberties organizations. These organizations represent almost every major faith group in America, spanning the spectrum of religious diversity in America—Christians, Jews, Moslems, Native Americans and Sikhs. The Coalition includes religious liberals and conservatives, and groups with world views as disparate as People for the American Way and Concerned Women for America. They are united by the conviction that the protection of religious liberty is an essential element of a democratic society. (Its members are listed in Appendix A.) The Coalition was called into being in response to the decision of this Court in *Employment Division v. Smith*. It drafted, lobbied for, and ultimately secured the passage of, the Religious Freedom Restoration Act ("RFRA").

The Coalition takes no position on the question of whether RFRA requires the City of Boerne to adjust its landmarks preservation law to accommodate the religious obligations of Bishop Flores. This brief addresses only the question of whether RFRA is a constitutionally legitimate exercise of Congressional power.

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. (a) This Court has repeatedly held that government can constitutionally accommodate religion. It invited such accommodation in *Employment Division v. Smith*, and in numerous earlier cases. *Corporation of the Presiding Bishop v. Amos* establishes that the three-part test does not invalidate all accommodation.

(b) Since the beginning, legislatures have granted exceptions for religious objectives to secular laws, one of which

(the substitute of an affirmation for oath) is found in the Constitution itself.

(c) RFRA is constitutional even in light of cases such as *Estate of Thornton v. Caldor, Inc.* and *Texas Monthly v. Bullock*. Unlike these cases, RFRA does not require accommodation without a showing of a substantial burden on religious practice and without regard to the impact on third parties.

(d) Unlike case-by-case accommodation—which Petitioners advocate—accommodation under RFRA is available to all religious practitioners, without regard to their size or political clout. RFRA treats all religions equally. It does not require an inquiry into centrality, which might be entangling.

2. (a) This Court has repeatedly upheld Congress' power under § 5 to draft statutes which reach beyond the Amendment's core prohibitions to compensate for difficulties of proving violations. These principles sustain § 2 of the Voting Rights Act, as well as its ban on literacy tests, and Title VII of the 1964 Civil Rights Act (as it applies to state and local government). All that is necessary is that a "violation be lurking," a condition met here. Intentional religious discrimination in the granting or withholding of exemptions is unconstitutional and does exist. No formal fact-finding is required to justify an exercise of the power in this way.

(b) The legislative history of the Fourteenth Amendment indicates an intent to protect religious liberty. Moreover, under the then regnant philosophy of *Prigg v. Pennsylvania*, it was unnecessary to include § 5 to empower Congress to enforce § 1 of the Amendment. Taken together, these background facts counsel a broad reading of § 5.

3. (a) The separation of powers doctrine does not prevent Congress from reexamining the practical results of this Court's constitutional decisions and, if appropriate, addressing these results under one of its powers. When it does so, Congress

exercises a balancing function as important to the constitutional scheme as the separation of powers.

(b) *Ex Parte Klein*'s ban on rule of decision is inapplicable. RFRA is a permissible change of federal statutory law, not a direction to courts how to decide specific cases. Nor does *Klein* prohibit Congress from legislating a broadly applicable standard, as opposed to specific rules.

ARGUMENT

I. RFRA DOES NOT ESTABLISH RELIGION

A. RFRA Does Not Impermissibly Favor Religion Over Non-Religion

Petitioners first contend that RFRA violates the Establishment Clause because it "privileges religion over all other types of beliefs and [] meddles[] with the religious life of the nation."[1] [Cert. Petition at 19-20; Brief at 49.] This is an attack not on RFRA, but on all religious accommodation. It asserts that the government is required to be indifferent to the impact of its policies on religion and that government can shape its actions to accommodate all interests but religious ones. The argument ignores numerous precedents.

Employment Division v. Smith, 494 U.S. 872 (1990), implicitly rejects this argument. The majority there invited

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1. The Act does not define religion. This Court's precedents have alternatively insisted on a theistic definition of religion, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and a non-theistic one, *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). The issue has not yet arisen in the RFRA context. Courts have allowed RFRA claims to be made by members of a truly broad spectrum of religions, including non-traditional ones. Plainly religion should be given a generous construction so as not to set up government endorsed criteria for religion, a construction that would avoid potential constitutional difficulties. *Cf. Ashwander v. TWA*, 297 U.S. 288 (1936).

legislative exemptions for religious practices. "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in legislation as well ...." 494 U.S. at 890. Petitioners must believe that the Court was urging legislatures to violate the Constitution.

It was not only Justice Scalia who recognized the legitimacy of legislative exemptions. Before and after *Smith*, other Justices (including every sitting Justice except Justice Breyer, who has not yet considered the question), have rejected the argument that legislative accommodation of religion necessarily establishes religion:

> [T]he Constitution allows the state to accommodate religious needs by alleviating special burdens. ... [I]n commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference ....'" (Citations omitted.)

Board of Educ. v. Grumet, 114 S.Ct. 2481 (1994). 114 S.Ct. at 2492-93 (Souter, Blackmun, Stevens, O'Connor and Ginsburg, JJ.); *id.* at 2501 (Kennedy, J., concurring); *id.* at 2511-12 (Scalia, Rehnquist and Thomas, JJ., dissenting). Those declarations broke no new ground. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-36 (1987); *id.* at 341 (Brennan, J., concurring); *id.* at 347-48 (O'Connor, J., concurring); *Texas Monthly v. Bullock*, 489 U.S. 1, 17-21 (1989) (plurality opinion of Brennan, J.); *id.* at 327 (concurring opinion of O'Connor, J.); *id.* at 29-44 (Scalia, J., dissenting); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145. n.11 (1985); *Norwood v. Harrison*, 413 U.S. 455 (1977); *Wisconsin v. Yoder*, 406 U.S.

205 (1972); *Walz v. Tax Comm'r*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963).

In 1961, this Court upheld Sunday Blue Laws against free exercise challenges by Saturday Sabbath observers. While observing that exempting Sabbatarian merchants might create unfair competition, it nevertheless suggested that a statutory exemption might be appropriate. *Braunfield v. Brown*, 366 U.S. 599, 608 (1961). A year later, it upheld just such a statute against an Establishment Clause challenge by a competing merchant. *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218 (1962).

Petitioners' Establishment Clause argument is understandably devoid of precedential support other than a half-hearted invocation of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). [Petitioners' Brief at 47-48.] The *Lemon* argument was made, and rejected, in *Amos*[2] for reasons that are equally applicable here. In *Amos*, this Court applied the *Lemon* test to the broad religious corporation exemption of Title VII, 42 U.S.C. §2000e-1(a), and found that a statute exempting organizations from anti-discrimination law had the secular purpose of "allevia[ting] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 438 U.S. at 385. It did not have the primary effect of advancing religion, in the Court's view, because it merely allowed the church to do what it would have done anyway. *Id.* at 337. And, even assuming that there is any relevance of the entanglement test in the context of activities other than recurring appropriations, *Bowen v. Kendrick*, 487

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2. The status of the three-part test is not entirely clear. Compare *Board of Educ. v. Grumet*, 114 S.Ct. at 2494-95 (Blackmun, J.) with *id.* at 2498-99 (O'Connor, J.). The *amici* themselves are divided on the desirability and vitality of that test.

U.S. 589 (1988), RFRA, like the Title VII exemption, does not require any weighing of the relative importance of religious beliefs, see Point I.B., *infra*, which would entangle courts in religious questions.

i. Case Law Recognizes the Permissibility of Accommodation

The argument from precedent for the facial invalidity of accommodation rests on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Neither sustains the argument. *Texas Monthly* struck a Texas sales tax imposed on secular, but not religious, magazines. Even Justice Brennan's plurality opinion, the judicial high water mark of Establishment Clause restrictions on accommodation, sustains RFRA. Justice Brennan explained that an accommodation which neither imposes substantial burdens on third parties nor subsidizes religious practice in ways unrelated to the alleviation of a burden on religious practice will not be invalidated as an impermissible preference. 489 U.S. at 15 and 18, n.8. See also *Board of Educ. v. Grumet*, 114 S.Ct. at 2501 (Kennedy, J., concurring).

RFRA applies only when government imposes a substantial burden on religious practice. It thus easily passes the second of Justice Brennan's tests, that an accommodation ease a governmental burden on religion. In the vast majority of cases, religious accommodation does not impose a substantial burden on others. Where it does, a state may well have a compelling interest in not accommodating religion.

Justice Brennan's opinion did not command a majority. Justice White concurred on freedom-of-the-press grounds. Three Justices (per Justice Scalia) objected that Justice Brennan's opinion tilted too far against free exercise, for "our cases make plain that it is permissible for a State to act with the purpose and effect of limiting governmental interference with the exercise of

religion." *Id.* at 40. Two other Justices (O'Connor and Blackmun), while finding the Texas statute infirm for directly subsidizing religious speech while not funding directly competitive secular speech, also argued that Justice Brennan's formulation cabined permissible accommodation too narrowly, subordinating the Free Exercise Clause to the Establishment Clause. *Id.* at 27. Taken together, nothing in these opinions remotely sustains the claim that RFRA establishes religion.

Estate of Thornton v. Caldor, Inc., involved a statute that absolutely required employers to accommodate the Sabbath observances of their employees. Moreover, no religious practice other than Sabbath observance was protected. As Justice O'Connor noted in her concurrence, that case did not compel the invalidation of more universal and flexible forms of accommodation. 472 U.S. at 711-12. RFRA applies to all religious practices. Its compelling interest defense provides the flexibility wholly absent in *Caldor, Inc.*

ii. Legislative Precedents Support the Constitutionality of Exemptions

Legal historians disagree whether exemptions were mandatory or merely permissive in the early years of the Republic, compare M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L.Rev. 1409 (1990) with P. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Washington L.Rev. 915 (1992). There is, however, no gainsaying the fact that religious exemptions from neutral laws have long been granted by legislatures.

The Constitution itself exempts those with religious exemptions from taking the prescribed oath, Art. VI, cl. 3, permitting an affirmation in its place. Congress soon followed that policy for witnesses, an exemption which continues uninterrupted to this day. 1 U.S.C. §1, *s.v.* - oath; 28 U.S.C. §

459, 953; Fed.R.Civ.P. 43(d); Fed.R.Evid. 603; McIntire's Case, Fed. Cas. No. 8,824 (C.C. Dist. Col. 1803). Conscientious objectors have enjoyed an exemption from compulsory military service from the earliest days of the Republic. *United States v. Seeger*, 380 U.S. 163 (1965). Churches enjoyed the benefit of real property tax exemption from an early date. *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

James Madison, a leading separationist, proposed as part of the Bill of Rights guaranteeing the right of conscience against state interference. Constitution of the United States of America: Analysis and Interpretation (1987) at 963-64. Madison saw no inconsistency between not establishing religion and insulating individual believers from the coercive power of the state. In short, wherever one looks for guidance, the position of Petitioners runs athwart history.

B. RFRA Does Not Create Impermissible Entanglement With Religion

A second argument made against RFRA is that it plunges courts into the morass of deciding whether a practice is central to the claimant's religion. See, e.g., *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), petition for cert. pending, No. 96-710. Petitioners echo this claim. "The Act necessarily fails the entanglement prong by forcing every government to become expert on every religion." [Petitioners' Brief at 48.] They warn that legislatures will be forced to conduct official investigations of the universe of religious beliefs in order to comply with RFRA.

That argument rests on a misunderstanding. RFRA does not invalidate any statute before it creates a substantial burden on religious practice. No government need worry about the possibility that a particular Act may some day trench on someone's religious practice, nor need it conduct a survey of all world religions to determine whether any adherents might be

affected by a proposed action. RFRA requires only that, when a conflict is called to government's attention, it accommodate that practice if not in conflict with a compelling interest. Petitioners' rhetorical specter of a government commission investigating all religion is frightening; it merely has nothing to do with RFRA.

Equally wrong is the argument that RFRA is entangling because it applies only where a substantial burden is imposed on a practice central to a faith. Centrality is not a threshold question under RFRA. Nothing in the phrase "substantial burden" necessitates an inquiry into centrality. The a "burden" threshold is drawn from this Court's opinion in *Sherbert v. Verner*, *supra*, 374 U.S. at 403. *Sherbert* has survived *Smith*, *Keeler v. Mayor and City Council of Cumberland*, 940 F.Supp. 879 (Md. 1996). But if the inquiry necessary to determine if a religious practice imposes a substantial burden creates excessive entanglement, *Sherbert*, too, fails on Establishment Clause grounds.

The sponsors of RFRA demonstrated a detailed acquaintance with this Court's Free Exercise decisions. They must be presumed to have been aware of this Court's holdings that courts could not inquire into centrality. See *Employment Division v. Smith*, 494 U.S. at 886-87; *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 435 (1988). Nothing in the legislative history suggests that Congress insisted on such an inquiry for RFRA. Familiar canons counsel against reading a statute to create a constitutional difficulty. *Ashwander v. TWA*, 297 U.S. 288 (1936). Several courts have rejected a centrality threshold. *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996); *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996); *The Jesus Center v. Farmington Hills ZBA*, 215 Mich.App. 54, 544 N.W.2d 698 (1996). Contra, e.g., *Small v. Lehman*, 98 F.3d 762 (3rd Cir. 1996). As the Second Circuit put it:

> [T]he judiciary has but a "limited function ... in determining whether beliefs are to be accorded [RFRA] protection." Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. Any inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom; thus, courts are not permitted to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be.

76 F.3d at 476 (citations omitted).

The "substantial burden" language of §2000bb-1 is not rendered superfluous by this reading. Some religion-state conflicts can be avoided without any compromise of religious practice. In *Tony and Susan Alamo Foundation v. Secretary*, 471 U.S. 290 (1985), a church challenged a ruling requiring it to pay adherents working in church enterprises the minimum wage. The church objected that its adherents were religiously bound not to enrich themselves at its expense, and that their receipt of wages from the church interfered with that obligation. This Court noted, however, that adherents remained free to donate their earnings to the church or to be paid with in-kind services. The challenged statute worked no burden on the church that it could not avoid without modifying its religious practices. RFRA's "substantial burden" language codifies this holding.

The "substantial burden" test also excludes claims where the secular burden is too trivial to coerce religious behavior or to serve as a likely vehicle for discriminating against unpopular faiths. *Sherbert* rests on the insight that substantial indirect penalties on religious practice coerce religious behavior as much as a direct ones. But some secular benefits are trivial and their denial no burden. In *Smith v. North Babylon School District*, 844 F.2d 90 (2d Cir. 1988), a student objected to the scheduling

of her high school graduation on her Sabbath. She asserted that the school was obligated to accommodate her by rescheduling it. The Second Circuit held that the benefit of attendance at graduation was too insignificant to exert pressure on Smith to compromise her faith. This rule, too, is embodied in the "substantial burden" language.

C. RFRA's Broad Scope Minimizes the Likelihood of Religious Favoritism in the Granting of Accommodation

Petitioners insist that accommodation should be worked retail (despite their apparent inconsistence with almost all of their Establishment Clause argument [Petitioners' Brief at 48]). Such exemptions, often designed to alleviate the problem of a particular faith group, may be granted unfairly by legislatures, which may well respond only to powerful, popular and sympathetic religions. See *Smith*, 494 U.S. at 890.

That *ad hoc* potential is not without potentially serious constitutional repercussions. "The anomalous case-specific nature of ... legislative authority ... leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the establishment clause, that government should not prefer one religion to another, or religion to non-religion." *Board of Educ. v. Grumet*, *supra*, 114 S.Ct. at 2491. *Id.* at 2497 (O'Connor, J., concurring).

RFRA requires religious accommodation wholesale. It allows any faith, no matter how small, unpopular or politically ineffectual, to press its claims before a neutral arbiter under an objective and religiously neutral standard. The consideration and adjudication of RFRA claims facilitates judicial review for fairness and minimizes favoritism to the vanishing point. Petitioners ask this Court to choose between their retail model, which virtually invites religious favoritism, and RFRA's wholesale approach, far less susceptible to manipulation. There is no

question as to which policy poses less risk to Establishment Clause values.

Petitioners construe the Establishment Clause to require the government to ignore the impact of its practices on religious observers. They have forgotten this Court's declaration that the Constitution does not require that. *Zorach v. Clauson*, 343 U.S. 306 (1952). Moreover, without the ability to exempt religious belief from the scope of neutral regulation, legislatures would often be forced to choose between legislating for the public good or imposing rules on religious institutions and individuals that force a violation of their view of God's will, a result public opinion will often not tolerate. In areas as diverse as abortion, gay rights, landmark preservation, employment and public education, the result will be a reluctance to legislate altogether.

Thirty-five years ago, Justices Goldberg and Harlan warned against reading the Establishment Clause to require an all pervasive secularism. *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion). Petitioners invite this Court to ignore that warning. Their invitation should be declined.

II. RFRA WAS AN APPROPRIATE EXERCISE OF CONGRESS' POWER UNDER § 5 OF THE FOURTEENTH AMENDMENT

Congress' power to enact RFRA turns on the scope of § 5 of the Fourteenth Amendment. Petitioners argue for a narrow reading of that power, particularly on some of the broader reaches of *Morgan v. Katzenbach*, 384 U.S. 641 (1966). *Amici* believe that Petitioners read the Fourteenth Amendment too narrowly. As interesting as the question of the scope of § 5 is, it is unnecessary to reach it. RFRA easily fits within the narrowest possible reading of § 5—that Congress has the power to ensure that core prohibitions of the Amendment are effectively redressed.

A. RFRA Facilitates Enforcement of the Ban Against Religious Discrimination

The Free Exercise and the Equal Protection Clauses prohibit intentional governmental discrimination against religion generally or against a specific religion, *Rosenberger v. Rector*, 115 S.Ct. 2510 (1995); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982). So would a discretionary action by a local body, such as a zoning board, designed to exclude a particular faith. *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995). That ban on religious discrimination is not circumvented by cloaking discrimination in neutral garb, just as the bar on racial discrimination is not elided by overt neutrality. *Church of the Lukumi Babalu Aye*, *supra*; *cf. Underwood v. Hunter*, 471 U.S. 222 (1985). Even a facially neutral statute or act should be struck if motivated by religious bias. Unfortunately, such animus is hard to document.

Church of the Lukumi Babalu Aye considered a facially neutral ordinance banning animal slaughter. The City of Hialeah asserted health, sanitation and animal rights justifications when challenged by the church whose religious ritual of animal sacrifice was outlawed by the ordinances. After a nine-day trial, a seasoned district court judge found no evidence of religious discrimination. 723 F.Supp. 1467 (S.D. Fla. 1989). Three experienced circuit judges affirmed. 936 F.2d 586 (11th Cir. 1991).

This Court unanimously reversed. Carefully parsing the ordinances and reviewing the history of their enactment, it concluded that the ordinances had the purpose of suppressing the Santeria faith. But even the members of this Court could not agree on a methodology. Compare 508 U.S. at _____; *Id.* at _____ (Scalia, J., concurring); *Id.* at _____ (Souter, J., concurring). Other courts have only with difficulty unmasked

religious bigotry. *Mississippi Islamic Center v. City of Starkville*, 876 F.2d 465 (5th Cir. 1989) (variance); *Campos v. Coughlin*, 854 F.Supp. 194 (S.D.N.Y. 1994).

Public officials are aware that outright expressions of religious hostility are politically unacceptable and legally indefensible. As Judge Jerome Frank observed:

> Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled "Use me", like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland.

F.W. Woolworth v. NLRB, 121 F.2d 658, 660 (2d Cir. 1941).

The drawing of inferences is a more difficult manner of proof than the use of direct evidence. It is fraught with uncertainty and the possibility of mistake. Congress had every reason to believe that the result would be religious discrimination going undetected. Congress was not just speculating. It heard extensive testimony to this effect from religious liberty practitioners.

Because many of its members began their careers at the local level, Congress was aware of the subtle ways in which bias can be disguised behind ostensibly neutral decisionmaking. Members were also aware that the more powerful churches are able to shape legislation to avoid conflicts with their religious practices. Smaller, less organized faiths are unable to protect themselves in the process either because they are unaware of it, or because of outright bias. To take an obvious case, Kosher ritual slaughter was permitted under the Hialeah ordinances, but Santeria ritual slaughter was not. *Church of the Lukumi Babalu Aye v. City of Hialeah*, *supra*, 508 U.S. at ____.

That the concern about hidden bias is weighty is illustrated by landmark preservation law. Whether a particular building is important enough to be landmarked, whether a particular alteration would destroy its historical value, and whether hardship has been demonstrated, are all highly discretionary judgments, easily subject to manipulation by multi-member decision making bodies in pursuit of religious or anti-religious agendas. Congress could and did readily conclude that discretionary decisionmaking is not easily reviewed for bias:

> After *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

H.R. Rep. 103-88 at 6.

The Senate Committee likewise found that governmental bodies will rarely reveal their intent to deliberately disadvantage religious minorities. It agreed with Justice O'Connor's observation that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." S.Report 103-111 (103rd Cong. 1st Sess.) at 7. See also 42 U.S.C. 2000bb(a)(2) (same).

Moreover, this judgment finds empirical support in the related and equally discretionary area of church zoning. If one reviews church zoning cases decided in the last ten years, for example, one is struck by the inverse relationship between the size of a church and the number of church zoning cases involving it. There are at most a handful of cases involving Catholic, Methodist or Episcopal churches but dozens involving small evangelical churches and Orthodox Jewish synagogues. There is more than one reason for this phenomenon, but bias by decisionmakers (and communities) is surely an important one.

Indeed, if the testimony of religious liberty experts were not sufficient, and if the knowledge of members of Congress did not carry the burden of demonstrating that neutral laws often mask discrimination, this Court's decision in *Smith* would fill in the gap. The majority there acknowledged that the discriminatory availability of accommodation was one likely result of its judgment. 494 U.S. at 890.

RFRA ferrets out bias by requiring proof of a legitimate motive when government imposes a substantial burden on religious exercise. The compelling interest test, coupled with the least restrictive alternative inquiry, screens out those cases where the government's interest is not truly secular, but intended to suppress or disadvantage a faith. The stringency of the compelling interest test, and the requirement of a close fit between means and ends, are well designed to ensure that hidden bias does not go undetected..

B. Congress Has Broad Power to Guard Against Purposeful Religious Prejudice

It is common ground that within its sweep, the § 5 power is broad indeed. Like the enumerated powers of Art. I, § 8, the § 5 power includes:

> Whatever legislation is appropriate, that is, adopted to carry out the objective the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure all persons the enjoyment of perfect equality of civil rights and the equal protection of the law against State denial or invasions, if not prohibited, is brought within the domain of congressional power.

Ex Parte Virginia, 100 U.S. 339, 345-46 (1879).

Surely, Congress may "enforce submission to the prohibition" on intentional religious discrimination. Where a "violation lurks," Congress may act. *EEOC v. Wyoming*, 460

U.S. 226, 260 (1983) (Burger, C.J., dissenting). RFRA prohibits some actions that are not intentionally biased, but that sweep is constitutionally appropriate given the legitimate concern with "lurking" intentional religious discrimination and the difficulties of proof.

This broad power trumps the reserved power of the states. Speaking in the analogous context of the Fifteenth Amendment, this Court wrote: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." Moreover, "Congress may take steps to permit litigation against states ...constitutionality impermissible in other contexts." *Fitzpatrick v. Bitker*, 427 U.S. 445, 453, n.9 (1976). *Accord City of Rome v. United States*, 446 U.S. 156, 172-78 (1980).

But Petitioners say [Brief at 35-36] that Congress did not make explicit findings that official religious discrimination is a substantial problem. This reflects the view of Justice Harlan, dissenting in *Morgan v. Katzenbach*, *supra*. The majority of the Court, though, held otherwise. "It is enough that we can perceive a rational basis for Congress to have acted as it did." 384 U.S. at 652-53. What has been said above about the existence of religious discrimination certainly satisfies this requirement. Petitioners' brief (*Id.*) can also be read to require Congress to consider the consequences of its lawmaking. Nothing in *Morgan v. Katzenbach*.

In *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980), this Court reiterated that formal findings were unnecessary in upholding an act that lacked them: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative hearings." Justice Powell, concurring, likewise rejected such a requirement:

> [C]ongress is not expected to act as though it were duty bound to find facts and make conclusions of law.

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant ....

448 U.S. at 502-03.

C. RFRA is But the Latest Example of Congress' Exercise of a Broad § 5 Power

Congress has repeatedly prohibited conduct which is not itself illicit in order to ensure that prohibited conduct does not go unremedied.

i. Title VII and the States

A state violates the Equal Protection Clause only if it deliberately discriminates. *M.L.B. v. S.L.J.*, 65 U.S.L.W. 4035, 4042 (1996). A law which merely has an adverse impact is not unconstitutional. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). Nevertheless, relying on § 5, Congress extended Title VII's adverse impact theory to the states on the ground that barring *de facto* discrimination was an appropriate way of ensuring that sophisticated forms of intentional discrimination did not go undetected. *Fitzpatrick v. Bitker*, 427 U.S. 445, 453, n.9 (1976); M. Pawa, When The Supreme Court Suppresses Constitutional Rights, Can Congress Save Us?, 141 U.Pa. L.Rev. 1029, n. 369 (1993) (collecting cases). RFRA is similarly justified.

ii. The Voting Rights Act

Congress' remedial powers were again invoked in *City of Rome v. United States*, 446 U.S. 156 (1980). Simultaneously

with its decision that the Fifteenth Amendment barred only intentional discrimination, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court upheld Congress' power to prohibit electoral changes having the effect of causing a retrogression in minority political power (42 U.S.C. § 1973):

> [T]he Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.

Congress in 1982 extended the effects test to all Voting Rights Act ("VRA") claims, including those arising under § 2. *Thornburg v. Gingles*, 478 U.S. 30 (1986). That extension, too, was unsuccessfully challenged. *Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984), aff'd *sub nom*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1985), citing *Major v. Treen*, 574 F.Supp. 325, 342-49 (E.D. La. 1983). *Major* explained:

> Congress ... determined ... that the intent test inordinately burdened plaintiffs in vote dilution cases, was unnecessarily divisive due to the charges of racism which must inevitably be leveled against individual officials or entire communities, and ... compelled protracted, often futile, inquiries into the motives of officials who acted many years ago. .... Congress enact[ed] a legislative prophylaxis, calculated to forestall the institution of potentially discriminatory

> electoral systems and extirpate facially neutral devices or procedures which continue to expose minority voters to harmful consequences rooted in historical discrimination. (Citations omitted.)

The same rationale justifies VRA's ban on literacy tests. 42 U.S.C. §1973aa. Fairly administered, such tests are constitutional, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). Nevertheless, this Court in *South Carolina v. Katzenbach*, 383 U.S. 307, 333-35 (1966), upheld a temporary statutory ban on literacy tests as against the claim that by preempting the judicial process of case-by-case litigation the Act violated the Court's core role of enforcing the Fourteenth Amendment. "On the contrary, § 2 of the Fifteenth Amendment expressly declares that Congress shall have power to enforce .... [The Framers] indicated that Congress was to be chiefly responsible for implementing the rights ..." protected by the Amendment. *Id.* at 325.

RFRA cannot be distinguished from the VRA cases on the ground that instances of religious bigotry are outweighed by a larger number of cases where bias is absent and hence that RFRA is too strong a remedy for whatever problem exists. How much undetected or unremedied bias to tolerate is a legislative question. Thus, under § 5 of the VRA (another exercise of Congress § 5 power) the Justice Department in 1995 interposed 19 objections out of a total of 3987 preclearance submissions. (Copies of the reports are lodged with the Clerk.) The question calls for a political judgment, one the Constitution commits to Congress.

Oregon v. Mitchell, 400 U.S. 112 (1970), upheld a permanent statutory ban on literacy tests. The multiple opinions of the Court were summarized in *Fullilove*:

> The [*Mitchell*] Court was unanimous, albeit in separate opinions, in concluding that Congress was within its

> authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of [foreclosing the possibility that purposefully discriminatory administration of literacy tests would escape undetected and] attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. (citations omitted).

448 U.S. at 477.[3]

Similar reasoning has lead courts to uphold application of the Americans With Disabilities Act to state prisons. See *Kaufman v. Carter*, 1996 W.L. 731925 (E.D. Mich. 1996); *Niece v. Fitzner*, 941 F.Supp. 1497, 1500-04 (E.D. Mich. 1994); *Armstrong v. Wilson*, 942 F.Supp. 1252, 60-61 (N.D. Cal. 1996).

D. The Framers of the Fourteenth Amendment Intended to Protect Religious Liberty

Chief Justice Rehnquist's dissent in *Hutto v. Finney*, 437 U.S. 678, 717-18 (1982), suggests that § 5 is broad only when applied to the guarantee against racial discrimination. No suggestion to this effect appears in any of the cases discussing the scope of Congress' power under § 5. It is supported neither by the text of the Fourteenth Amendment nor the ratification debates. Congress and the Courts have not acted as if such a limitation existed. Section 1983 is used equally to enforce the

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3. *Fullilove*, 448 U.S. at 476-80 used this same analysis with regard to congressional power to enact contract set-asides. *Adarand Contruction, Inc. v. Pena*, 115 S.Ct. 2097 (1995), restricts the use of contract set-asides not because Congress lacks the power to enact broad remedies for discrimination, but because the Equal Protection Clause imposes special restraints on the use of race conscious remedies.

Due Process Clause, the Equal Protection Clause, and other incorporated rights.

Moreover, the legislative history of the Fourteenth Amendment demonstrates an intention to protect the free exercise of religion from state intrusion, including impingement by facially neutral laws. K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exception Under the Fourteenth Amendment*, 88 N.W.U. L.Rev. 1106 (1994). Professor Lash demonstrates that, because the Fourteenth Amendment grew out of the national crisis over slavery, one of its goals was protecting religious liberty.

Sometimes invoking facially neutral laws, defenders of slavery silenced abolitionist religious voices and prevented slaves from having access to their religious materials. *Id.* at 1131-33. As Professor Lash puts it, "[t]he architects of the Fourteenth Amendment were well aware of how slavery had resulted in the suppression of religious exercise," *Id.* at 1146. They were determined to prevent a repetition:

> Religious exercise was to be protected from majoritarian hostility or indifference; it was to be a substantive right affording more than simply "equal protection"; and its protection created a zone of autonomy within which both mandatory and discretionary aspects of religious exercise were protected from government interference. Most important, by explicitly targeting "religiously neutral" laws as examples of what would become unconstitutional with the passage of the Fourteenth Amendment, men like John Bingham and Lyman Trumbull gave notice that in the future, generally applicable laws might sometimes impermissibly violate an individual's religious liberty.

88 N.W.U. L.Rev. at 1149.

E. The Legal and Political Background of the Fourteenth Amendment Supports Congress' Power To Enact RFRA

The fit between RFRA and the power of Congress to make certain that core violations of the Fourteenth Amendment do not go undetected and unremediated, does not exhaust the possible bases for an exercise of power under § 5. While others address these bases in a more comprehensive way, we believe that it is important to note that the political and legal background against which § 5 was written makes it unlikely that its drafters intended it to be given the narrow reading suggested by Petitioners. There is substantial reason to think that § 5 was intended to empower Congress to go beyond what the Constitution requires, provided only that it does not violate some other constitutional provision.

Section 5 reallocated power between the national legislature and the judiciary, and between the federal government and the states, because of abuses revealed during the slavery crisis. *Dred Scott v. Sanford*, 60 (19 Howard) U.S. 393 (1857), and *Ableman v. Booth*, 62 U.S. 506 (1858), helped spark the Civil War. Rectifying these judicial 'mistakes' was a primary goal of the drafters, A.Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1222-24 (1992). Those who enacted the Fourteenth Amendment were not about to entrust their handiwork solely to the same courts that had protected slavery. Section 5 insured that the Congress could define the rights protected by the Amendment, provided only that it observed the minimum standards imposed by the Amendment itself—the so-called one way ratchet. *City of Richmond v. J.A. Crosson*, 488 U.S. 469, 490 (1989) Opponents of ratification argued unsuccessfully that the Amendment should not be ratified because § 5 threatened federalism. See generally, J.B. James, The Ratification of the Fourteenth Amendment (1984).

Moreover, under then prevailing constitutional theory, there was no need to include § 5 to authorize Congress to implement § 1. In *Prigg v. Pennsylvania*, 42 U.S. 539 (1842), the Supreme Court held that, given the Constitution's protection for slave

ownership, Congress had the authority to protect it even without an explicit grant of power:

> If ... the Constitution guarantees the right ... the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle ... would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted.

42 U.S. at 615-16. (Citations omitted.)

Supporters of the Fourteenth Amendment repeatedly invoked *Prigg*. E.M. Maltz, Civil Rights, The Constitution and Congress 1863-69, 64-66 (1996); R.J. Kaczorowski, The Nationalization of Civil Rights - Constitutional Theory and Practice in a Racist Society, 1866-1883 (1987) at 97. This Court has acknowledged *Prigg* to be the governing law at the time the Fourteenth Amendment was adopted. *Quern v. Jordan*, 440 U.S. 332, 343, n.14 (1979); *Monnell v. City of New York*, 436 U.S. 658, 672 (1988). It follows that § 5 was unnecessary to allow Congress to enforce §1 as written, but must have meant something more.

This political and legal background establishes that the drafters of the Fourteenth Amendment intended Congress to have broad latitude to assert its legislative power, and that the § 5 power is not narrowly confined to the exact metes and bounds of § 1. A more clear-eyed prescription for RFRA could hardly be imagined.

III. RFRA IS FULLY CONSISTENT WITH THE SEPARATION OF POWERS

Petitioners' separation of powers argument is even less substantial. Stripped to its essentials, the claim is that once this Court interprets the Constitution leading to certain real world results, Congress may do nothing to reach a different real world

result. Petitioners are not clear about the basis of this rule, but it appears to be motivated by a rule against judicial *lese majeste*. The point appears, moreover, to be one of timing. Had RFRA preceded *Smith*, it would not violate the separation of powers. It is the act of responding to this Court's decision which generates the argument.

Petitioners make this claim—for which they cite no precedent—in the face of this Court's invitation in *Smith* for legislative accommodation. Petitioners do not and cannot explain why Congress' response to that invitation is unconstitutionally disrespectful of the Court's authority. Petitioners' claim is also belied by well-worn political paths and judicial precedents.

A. Separation of Powers Doctrine Does Not Bar Corrective Legislation

Lassiter v. Northampton County Bd. of Elections, *supra*, held that the use of literacy tests was within the authority of the states to regulate the franchise. The VRA banned them. 42 U.S.C. §1973aa. Courts now decide challenges to literacy tests under a statutory standard, not a constitutional one; just as accommodation cases are now decided under a statutory standard, not a constitutional one. This Court has twice sustained these voting rights provisions. *Oregon v. Mitchell*, *supra*; *South Carolina v. Katzenbach*, *supra*.

In *City of Mobile v. Bolden*, *supra*, the Court held that *de facto* voting discrimination did not violate either the Fifteenth Amendment or the Voting Rights Act. This Court emphasized that there were important policy reasons to permit the states to use electoral devices with adverse racial consequences. 446 U.S. at 78-80; *id.* at 88-90 (Steven, J., concurring). Congress promptly amended the VRA to ban *de facto* electoral discrimination. 42 U.S.C. §1973. The legislative history of those amendments is as sharply critical of *Bolden* as the RFRA

Congress was of *Smith*. This revised statute has irrevocably changed the shape American politics.

Zurcher v. Stamford Daily, 436 U.S. 547 (1978), holds that the Fourth Amendment imposed no special restraints on searches of newspaper offices for evidence. This Court's opinion emphasized the importance to law enforcement of obtaining all possible evidence without delay or obstruction. 436 U.S. at 560-63. Congress did not agree with this Court's weighing of the respective interests of the press and police. The Privacy Protection Act of 1980, adopted the position of the *Zurcher* dissenters. 42 U.S.C. §2000aa. That newly created statutory right interfered with state interests recognized as valid by this Court.

Congress' willingness to sidestep the Court's constitutional decisions—subject to leaving the decision itself in place as an authoritative interpretation of the Constitution—is not limited to the field of civil rights. The Commerce Clause invalidates state regulation that interferes with the national market contemplated by the Constitution. Yet Congress has the power to tolerate just such interference under Art. I, § 8. This Court has even invited legislative revision of its Commerce Clause decisions. See, *e.g.*, *Barclays Bank PLC v. Franchise Tax Board*, 114 S.Ct. 2268, 2286 (1994).

B. RFRA Does Not Impose a Rule of Decision

Ex parte Klein, 13 Wall. 128 (1872) said that Congress may not prescribe a rule of decision for the courts, a holding that one court says invalidates RFRA. *Keeler v. Mayor and City of Cumberland*, 928 F.Supp. 591 (D. Md. 1996). It does not. *Klein* refused to enforce a statute directing the courts to ignore a presidential pardon. *Klein* is most narrowly read to stand only for the noncontroversial proposition that Congress may not undermine the presidential pardon power. RFRA trenches on no power exclusively committed to another branch. Congress did

say that the Free Exercise Clause means something other than what this Court says it means.

Even read more broadly, *Klein* does not invalidate RFRA. Every statute provides a rule for deciding disputes of decision. There is a dispositive difference between a legislature changing the law and acting as a super fact-finder. The former is the everyday business of legislatures, the latter intrudes upon the courts' core function. RFRA falls into the permissible category.

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), involved an environmental dispute. With litigation pending, Congress compromised the competing claims. The Ninth Circuit invalidated the compromise because it impacted on the litigation, purportedly in violation of *Klein*. This Court reversed, because Congress had changed the underlying substantive law. "Whatever the precise scope of *Klein* ... later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law,' *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992)." *Plaut v. Spendthrift Farms, Inc.*, 115 S.Ct. 1447 (1995). RFRA fits this mold precisely.

C. *Klein* Does Not Proscribe Use of Legislative Standards

Keeler also invalidated RFRA because it was supposedly directed not at regulating the conduct of government officials, but solely at judges. 928 F.Supp. at 603-04. It reasoned that RFRA does not dictate results in specific cases (*e.g.*, protecting peyote consumption) but instead only prescribes a standard for determining which religious activities are protected. This reasoning is flawed. RFRA is not directed solely at the courts. It tells officials that they must take religious practice into account, and how they must do so. State and federal agencies are bound to abide by RFRA. State attorneys general have applied it. *Ark. O.A.G.*, 93-414, (1994); *Md. O.A.G.*, Opinion

94-037 (1994) (landmark preservation law fails RFRA). Only where there is a *bona fide* dispute is RFRA applied by a court.

RFRA's use of a "standard" as opposed to a specific rule is hardly unprecedented. Title VII prohibits state and local governments from using employment criteria that adversely impact minorities without justification. 42 U.S.C. §2000e-2. It does not say that specified criteria are illegal. The amended § 2 of the Voting Rights Act, 42 U.S.C. §1973, adopted by Congress in response to—indeed, by way of rejection of—*Bolden*, *supra*, *cf. Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986); *Id.* at 83-84 (O'Connor, J., concurring), does not proscribe any particular voting procedure. Modelling itself after a series of judicial decisions, it establishes a standard, not a rule.

Given the complexities of modern life, a rule proscribing generalized legislative standards would be wholly impracticable. It would also be a judicial intrusion on a grand scale into the operation of the legislature.

D. RFRA is Fully Consistent With *Marbury* and *Cooper*

Neither *Marbury v. Madison*, 5 U.S. 137 (1803), nor *Cooper v. Aaron*, 358 U.S. 1 (1958), holds that congressional action revisiting constitutional issues passed on by the Court is *per se* improper. *Marbury* merely holds that the Court is empowered to decide constitutional questions in cases properly before it. It does not say that no other branch acting within the proper scope of its constitutional authority can ameliorate the effects of a judicial decision. The holding of *Cooper* is that states may not unilaterally defease individual rights protected by the Fourteenth Amendment. *Cooper* is not a separation of powers case, but a preemption case.

That the Court has allowed Congress to ameliorate the practical implications of its decisions in favor of greater protection for individual rights than the Constitution provides, is

not mere prudence on its part. Rather, it reflects this Court's principled commitment to reconciling the separation of powers with checks and balances:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

"Separation of power principles are vindicated, not disserved, by measured cooperation between two political branches ... each contributing to a lawful objective throughout its own processes." *Loving v. U.S.*, 116 S.Ct. 1737, 1751 (1996). Thus, while only a court can convict someone of a crime, the President may nevertheless grant a pardon premised on the conclusion that the judiciary erroneously assessed guilt. The "Framers understood 'that a hermetic sealing off of these three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.'" *Id.* at 1743 citing *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

Loving does reassert the principle that one branch may not intrude on the core functions of another. RFRA does not violate that principle. The courts have the final say on what the Constitution means. In enacting RFRA, Congress did not usurp that role. Even today, the Free Exercise Clause means what *Smith* said it means. Moreover, Congress can repeal or modify RFRA at any time. It has already considered repealing RFRA as it applies to prisons. S.1093, 104th Cong., 1st Sess., Cong.Rec. (S)10895 (July 28, 1995). Congress cannot 'repeal' *Smith* or *Sherbert*.

CONCLUSION

The judgment below, that RFRA is facially constitutional, should be affirmed.

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APPENDIX A

Coalition for the Free Exercise of Religion

Agudath Israel of America

AmericanAssociation of Christian Schools

American Baptist Churches USA

American Civil Liberties Union

American Conference on Religious Movements

American Ethical Union, Washington Ethical Action Office

American Humanist Association

American Jewish Committee

American Jewish Congress

American Muslim Council

Americans for Democratic Action

Americans for Religious Liberty

Americans United for Separation of Church and State

Anti-Defamation League

Association of Christian Schools International

Association on American Indian Affairs

Baptist Joint Committee on Public Affairs

B'nai B'rith

Central Conference of American Rabbis

Christian Church (Disciples of Christ)

Christian Legal Society

Christian Life Commission, Southern Baptist Convention

Christian Science Committee on Publication

Church of the Brethren

Church of Scientology International

Appendix A **Coalition for the Free Exercise of Religion**

Coalition for Christian Colleges and Universities

Coalitions for America

Concerned Women for America

Council of Jewish Federations

Council on Religious Freedom

Council on Spiritual Practices

Criminal Justice Policy Foundation

Episcopal Church

Friends Committee on National Legislation

General Conference of Seventh-day Adventists

Guru Gobind Singh Foundation

Hadassah, the Women's Zionist Organization of America, Inc.

Home School Legal Defense Association

International Association of Jewish Lawyers and Jurists

International Institute for Religious Freedom

The Jewish Reconstructionist Federation

Mennonite Central Committee U.S.

Muslim Prison Foundation

Mystic Temple of Light, Inc.

National Association of Evangelicals

National Campaign for a Peace Tax Fund

National Committee for Public Education and Religious Liberty

National Council of Churches of Christ in the USA

National Council of Jewish Women

National Council on Islamic Affairs

National Jewish Commission on Law and Public Affairs

Appendix A **Coalition for the Free Exercise of Religion**

National Jewish Community Relations Advisory Council

National Sikh Center

Native American Church of North America

Native American Rights Fund

North American Council for Muslim Women

People For the American Way Action Fund

Peyote Way Church of God

Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (USA)

Rabbinical Council of America

Sacred Sites Inter-faith Alliance

Soka-Gakkai International - USA

Traditional Values Coalition

Union of American Hebrew Congregations

Union of Orthodox Jewish Congregations of America

Unitarian Universalist Association of Congregations

United Church of Christ, Office for Church in Society

The United Methodist Church & The General Board of Church and Society and The General Council on Finance and Administration

United Synagogue of Conservative Judaism

Wisconsin Judicare

Women of Reform Judaism, Federation of Temple Sisterhoods

No. 95-2074

FILED
JAN 8 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
-vs-
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (1994), comports with the Establishment Clause of the First Amendment.

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INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a not-for-profit public interest law firm and education organization. The ACLJ is committed to educating the public regarding individuals' First Amendment rights and related statutory rights, and to protecting those same rights, particularly, the freedoms of speech, religion and assembly. In furtherance of these goals, the ACLJ publishes informational materials for public dissemination. The ACLJ also furnishes, in appropriate circumstances, free legal services for the protection of those First Amendment rights.

Counsel of record for amicus ACLJ has argued seven times before this Court, including in the cases of *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). In *Mergens* and *Lamb's Chapel*, this Court rejected Establishment Clause objections to federal statutory and constitutional accommodations of the activities of private persons undertaken for religious purposes.

The ACLJ litigates numerous cases on behalf of clients who put their religious beliefs into practice — i.e., engage in the exercise of religion. The Religious Freedom Restoration Act (RFRA) provides an important statutory cause of action or, where needed, affirmative defense for such clients.

RFRA fits comfortably into the tradition of government accommodation of religious practices. The ACLJ submits this amicus brief specifically to rebut the assertion that RFRA somehow violates the Establishment Clause of the First Amendment.

The parties have consented to the filing of the present brief.

SUMMARY OF ARGUMENT

Petitioner charges that because the Religious Freedom Restoration Act (RFRA) expands religious liberty beyond the minimum scope of the Free Exercise Clause of the First Amendment (as construed by this Court), RFRA violates the Establishment Clause of that amendment. But under the Fourteenth Amendment incorporation doctrine, the same Establishment Clause limits state governments as well as the federal government. Hence, an attack on RFRA under the Establishment Clause is equally an attack on every state constitutional or statutory provision providing greater protection for religious freedom than is found in the federal guarantee. Petitioner completely overlooks this major consequence of its argument.

Fortunately, petitioner is mistaken in its claim that RFRA violates the Establishment Clause. This Court's unanimous decision in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), together with predecessor cases, confirm that the federal and state governments may permissibly accommodate religious liberty beyond the absolute constitutional minimum set by the Free Exercise Clause. RFRA simply accommodates religious freedom in such a wholly constitutional manner.

Application of the *Lemon* test does not alter this conclusion. Accommodating the exercise of religion is a legitimate legislative purpose, lifting substantial obstacles from religious exercise is a permissible primary effect, and the recognition of claims and defenses under RFRA entails no excessive entanglement between church and state.

ARGUMENT

Petitioner attacks the constitutionality of the Religious Freedom Restoration Act (RFRA) on several grounds. This amicus brief responds specifically to the charge that RFRA violates the Establishment Clause of the First Amendment. *See* Pet. Br. at 46-49; *see also* Amicus Br. of Center for the Community Interest at 5-9. As shown below, RFRA fully comports with the Establishment Clause.

I. PETITIONER'S ESTABLISHMENT CLAUSE CHALLENGE TO RFRA EQUALLY STRIKES AT ALL STATE CONSTITUTIONAL OR STATUTORY PROVISIONS THAT PROVIDE GREATER PROTECTION FOR RELIGIOUS LIBERTY THAN *SMITH* DOES.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion ...." U.S. Const. amend. I. This Court has held that the Fourteenth Amendment makes the Establishment Clause applicable to the states. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). This extension of the Establishment Clause to the states has profound implications for the analysis of the present case. For if the Establishment Clause forbids Congress from requiring strict scrutiny of religious liberty claims, then likewise, under the incorporation doctrine, the Establishment Clause forbids states from requiring — whether by state constitution or by statute — strict scrutiny for religious liberty claims.

It is settled doctrine that states, as sovereigns containing primary, independent authority to safeguard the life, liberty, and property of persons within their borders, are free to provide state constitutional protections greater than those

secured by federal constitutional provisions. *E.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (state constitution may provide greater protection for free speech than First Amendment does). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984).

Consequently, while this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), governs interpretation of the federal constitutional right to religious freedom, a state constitution can still provide stricter protection for religious liberty. For example, a state may prohibit any governmental burdening of religion, even by neutral and generally applicable laws, absent both a compelling government interest and no less restrictive means of furthering that interest. *E.g.*, *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (on remand from this Court in light of *Smith*, state supreme court holds that state constitutional right to religious freedom requires strict scrutiny analysis); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (1992) (same); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994) (state constitution requires compelling interest test); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (state constitution requires strict scrutiny). *See* Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275.

Petitioner's Establishment Clause argument threatens this jurisprudence of federalist constitutional diversity. By explicitly attacking RFRA, petitioner implicitly challenges all state constitutional or statutory provisions which, like

RFRA, provide greater protection for religious liberty than *Smith* does.[1]

Petitioner therefore faces a quandry. Petitioner allows on the one hand that "the states voluntarily could protect religious liberty more robustly than the Federal Constitution through their own constitutions or through legislative action." Pet. Br. at 45 (citations omitted). But with the other hand, petitioner argues implicitly that any such expansion of religious liberty would violate the Establishment Clause. Petitioner cannot have it both ways.

Fortunately, the escape from this quandry is clear: petitioner's constitutional premise — that RFRA violates the

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1. Amicus American Center for the Community Interest (CCI) likewise argues, in effect, that state constitutional guarantees of religious liberty inherently offend the Establishment Clause. If Congress "cannot place the religious claims of some over the secular policy judgments of others," CCI Br. at 5 (emphasis in original), and if Congress "may not place claims to act for religious reasons above similar claims to act for secular reasons of moral conscience," *id.*, then, under the incorporation doctrine, neither may the states do so. Yet this is precisely what both state and federal constitutional and statutory religious liberty provisions do (unless they are mere platitudes). *Compare People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127 (1993) (parents with religious objections to certification of home school teachers need not comply) *with People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106 (1993) (parents with nonreligious objections to certification of home school teachers must comply). In the very nature of things, nonreligious beliefs, while certainly entitled to due respect, do not trigger the same fundamental concerns — reflected in state constitutional provisions — which prompted the Framers of the Constitution to include the Establishment and Free Exercise Clauses as jealous guardians of religious liberty.

Establishment Clause — is simply mistaken.

II. RFRA IS A PERMISSIBLE ACCOMMODATION OF RELIGIOUS LIBERTY.

The scope and meaning of the Establishment Clause has been a source of unending debates both inside and outside this Court. The federal statute at issue here, however — RFRA — is so far removed from the core concerns of the Establishment Clause as to render those debates, for present purposes, strictly academic.

"It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the `establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970). RFRA neither sponsors nor financially supports religion or religious activity, and, if anything, RFRA reduces government involvement in religious activity.

A. Government May Permissibly Accommodate Religious Practice Beyond the Minimum Scope of Free Exercise Clause Requirements.

Petitioner's argument — that the formal, explicit legal protection of religious liberty violates the Establishment Clause — logically would render the Free Exercise Clause itself "unconstitutional" — an absurdity. Petitioner therefore must confine its argument to the contention that because RFRA provides greater protection than the Free Exercise Clause itself (as interpreted in *Smith*), RFRA invades the province of the Establishment Clause. But this Court has repeatedly rejected the argument that the Free Exercise Clause provides a ceiling as well as a floor for the freedom of

religion.

> It is well established ... that the limits of permissible [government] accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.

Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) (editing marks and citation omitted). Indeed, were the contrary proposition true, it would be unconstitutional to forbid private religious discrimination under Title VII, to recognize religious objections to military conscription, or to give any other statutory protection to religion that exceeded the bare minimum constitutionally required under the Free Exercise Clause.

This Court has never so held.

In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court upheld a provision exempting religious organizations from Title VII's ban on religious discrimination in employment. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices without violating the Establishment Clause." *Id.* at 334 (internal quotation marks and citation omitted).

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court upheld the exemption of church property from a city property tax. "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."

Id. at 676-77 (emphasis added).

In *Zorach v. Clauson*, 343 U.S. 306 (1951), this Court upheld a "released time" program in which government-run schools allowed children, upon parental request, to leave school grounds during a portion of the school day to attend religious instruction or devotional exercise at religious centers. This Court declared that such an accommodation "follows the best of our traditions," *id.* at 314.

The governmental accommodations in *Amos*, *Walz*, and *Zorach*, extended to all religions — "none was favored over others," *Walz*, 397 U.S. at 677. RFRA likewise applies to all "exercise of religion," thereby qualifying as a neutral accommodation measure. This case therefore differs markedly from *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In *Thornton*, only those religions which observed a Sabbath were accommodated: "the statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath." *Id.* at 709 (emphasis added; footnote omitted). *See also id.* at 711 (O'Connor, J., joined by Marshall, J., concurring) ("The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees") (emphasis added). *Cf. Amos*, 483 U.S. at 337 n.15 (distinguishing *Thornton*).

RFRA walks in the same path already trodden in *Amos*, *Walz*, and *Zorach*. In none of these cases were the accommodations of religious practices required under the Free Exercise Clause. But nor did it follow, this Court concluded, that any of these practices were prohibited by the

Establishment Clause.

B. RFRA Satisfies the *Lemon* Test.

Petitioner nevertheless contends that RFRA fails Establishment Clause analysis under the so-called *Lemon* test.[2] But *Lemon* has never been a rigid rule. *E.g.*, *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (*Lemon* test "no more than a helpful signpost") (editing marks and citation omitted). Indeed, a majority of this Court has not relied upon *Lemon* to invalidate a law for the better part of a decade. *See Rosenberger v. Rectors and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (rejecting Establishment Clause claim without applying *Lemon* test); *Capitol Square Review Bd. v. Pinette*, 115 S. Ct. 2440 (1995) (same); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (same); *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994) (invalidating government action under Establishment Clause without invoking *Lemon* test); *Lee v. Weisman*, 505 U.S. 577 (1992) (same); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting Establishment Clause claim with cursory invocation of *Lemon* test); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (rejecting Establishment Clause claim under *Lemon* test); *see also Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring) (noting and approving "the slide away from *Lemon*'s unitary approach"); *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., joined by Thomas, J., dissenting) (collecting prior opinions criticizing *Lemon* test). But even assuming the three-part *Lemon* test retains vitality, RFRA passes that test.

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2. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

"Under the *Lemon* standard ... a court may invalidate a statute only if it is motivated wholly by an impermissible purpose, ... if its primary effect is the advancement of religion, ... or if it requires excessive entanglement between church and state, ..." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (citations omitted). RFRA easily satisfies all three prongs of *Lemon*.

1. Purpose

Regarding the "purpose" prong, plainly Congress can act to remove the "substantial" burdens on the exercise of religion to which RFRA is directed.

> Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. We may assume for the sake of argument that the pre-[enactment status quo] was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization [which Congress addressed, and] Congress' purpose ... to minimize governmental "interference" ... does not violate the Establishment Clause.

Amos, 483 U.S. at 335-36 (editing marks omitted in part and altered in part). As in *Walz*, the government may look beyond the absolute minimum of the Free Exercise Clause to address "latent dangers" to religious liberty and take remedial action "simply sparing the exercise of religion from the burden" resulting from otherwise constitutional state action. *Walz*, 397 U.S. at 673.

2. Effect

RFRA clearly has a permissible "primary effect" as well. Because the Court laid this argument so thoroughly to rest in *Amos*, that decision merits quoting at some length.

> The second requirement under *Lemon* is that the law in question have a principal or primary effect ... that neither advances nor inhibits religion. 403 U.S. at 612. Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the [challenged Congressional enactment]. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz v. Texas Comm'n* ... or the loans of school books to school children, including parochial school students, upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968). A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, "[F]or the men who wrote the Religion Clauses of the First Amendment the `establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. *Accord Lemon*, 403 U.S. at 612.

Amos, 483 U.S. at 336-37 (emphasis in original).

Petitioner finds fault with RFRA because RFRA — like, this Court should note, the Free Exercise Clause itself —

"deliberately singles out religious practices, en masse, as a ... favored class of activity." Pet. Br. at 47. Again, this Court disposed of the argument in *Amos*:

> We find unpersuasive ... the fact that [the Act] singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, ... it has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. ... Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

Amos, 483 U.S. at 338 (emphasis added).

Petitioner contends that Congress offends the Establishment Clause by affording statutory protection to religion without extending the same protection to "functionally comparable nonreligious forms of belief and practice." Pet. Br. at 47-48. *See also id.* at 49 ("Congress may not favor religion over nonreligion or religion over philosophy"). This argument suffers deep flaws on two fronts. First, the Free Exercise Clause enshrines precisely the special protection for religion which petitioner finds invidious:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must

> be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, ... philosophical and personal rather than religious ... belief does not rise to the demands of the Religion Clauses.

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (footnote omitted). Second, if the Establishment Clause were to condemn government laws which distinguish between religion and "functionally comparable nonreligious forms of belief and practice," Pet. Br. at 47-48, then this rule would necessarily apply both when government accommodates only religion and when government accommodates only nonreligious philosophies. "State power is no more to be used to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18. Hence, for example, the entire governmental program of education — which promotes secular belief systems while disregarding "functionally comparable" religious beliefs and practices — would run afoul of the Establishment Clause. While this conclusion doubtless would find many sympathizers, this Court has not yet indicated its willingness to take that step.[3]

---

3. Petitioner accuses Congress of impermissibly saying that "the government likes religion." Pet. Br. at 48. But there is a crucial difference between allowing a practice under law and endorsing that practice. *Cf. Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion of O'Connor, J.). *See also McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., joined by Marshall, J., concurring in judgment) ("the interrelationship of the Religion Clauses has permitted government to take religion into account . . . to exempt, when possible, from generally applicable

3. Entanglement

Finally, RFRA creates no excessive entanglement between government and church. The "entanglement" prong of *Lemon* forbids interference with religious organizations by means of extensive monitoring of their functions. *See Bowen v. Kendrick*, 487 U.S. at 615-16 (and cases cited). To the extent RFRA has an impact on such monitoring, that impact will be to reduce such government monitoring whenever the surveillance substantially and unjustifiably burdens religious exercise. As for the adjudication of claims and defenses under RFRA, this requires no more entanglement than would a claim of inadequate accommodation of religious beliefs under Title VII, a determination of qualification for religious tax exemptions, a "hybrid" constitutional claim under *Smith*, or a host of other legal proceedings under the federal Religion Clauses, state constitutional religious guarantees, and various statutes and regulations referring to religion or religious practices. Nor does the requirement in RFRA, that government refrain from unjustifiably burdening religion, create excessive entanglement. *See Walz*, 397 U.S. at 674-75 (law lifting burden on religion reduces "the direct confrontations and conflicts that follow" from imposition of the burden and does not create "continuing" involvement between church and state "calling for official and continuing surveillance leading to an impermissible degree of entanglement").

---

governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish") (footnotes omitted).

Petitioner paints a nightmarish picture of a paralyzed government unable to take any action without extensive research into the implications of each proposed law on all religious practices. Pet. Br. at 48. But RFRA does not facially invalidate laws just because they do not accommodate "every potential religious objection to every ordinance," Pet. Br. at 48. Rather, RFRA only equips the believer with a claim or defense against application of a law or other government action to the believer. RFRA, 42 U.S.C. § 2000bb-1(b). Further, RFRA only applies if the burden is "substantial," *id.* Hence, petitioner's nightmare turns out to be no more than a gripe that government may not, with relative indifference, substantially and unjustifiably burden the religious practice of particular believers. Such a complaint merits little weight.

CONCLUSION

RFRA clearly passes muster under the Establishment Clause of the First Amendment. This Court should affirm the judgment below.

Respectfully submitted this 10th day of January, 1997.

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No. 95-2074

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

In The
Supreme Court of the United States
October Term, 1996

CITY OF BOERNE, TEXAS,
Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* IN SUPPORT OF RESPONDENT

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AMERICAN HOMEOWNERS FOUNDATION,
AMERICAN LAND RIGHTS ASSOCIATION,
AMERICAN LOGGERS SOLIDARITY,
AMERICANS FOR TAX REFORM,
CITIZENS AGAINST REPRESSIVE ZONING,
CITIZENS FOR CONSTITUTIONAL
PROPERTY RIGHTS, INC.,
CITIZENS FOR PRIVATE PROPERTY
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COMMITTEE FOR A CONSTRUCTIVE TOMORROW,
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NATIONAL CENTER FOR PUBLIC POLICY ANALYSIS,
NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
NEW HAMPSHIRE LANDOWNERS ALLIANCE,
NORTHWEST LEGAL FOUNDATION,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
PEOPLE FOR THE WEST! ACCORD CHAPTER,
PUTTING PEOPLE FIRST,
STOP TAKING OUR PROPERTY (STOP),
TAKE BACK ARKANSAS, INC.,
TEXAS JUSTICE FOUNDATION,
TEXAS PUBLIC POLICY FOUNDATION,
TRANS TEXAS HERITAGE ASSOCIATION,
and UNITED STATES BUSINESS AND INDUSTRIAL
COUNCIL
IN SUPPORT OF RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether the city's inclusion of Saint Peter's Catholic Church within a historic district substantially burdens Respondent's combined right to make reasonable use of private property and to exercise freely religious beliefs?

2. Whether historic preservation is a "compelling" state interest?

3. Whether Petitioner utilized the "least restrictive" means of furthering historic preservation?

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Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* submit this brief in support of Respondent. Consent to the filing of this brief has been granted by counsel for Petitioner and counsel for Respondent, and has been lodged with the Clerk of this Court. Consent has also been granted by counsel for Intervenor-Respondent United States of America, and is submitted along with this brief.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded in 1991 as a non-profit, public interest legal foundation in recognition of the fact that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause meaningless. Defenders' mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights, such as religious liberty. Defenders has

participated in every major case involving property rights before this Court since 1991 including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), and also participated in the Fifth Amendment challenge to the designation of Boyd Theatre as historic in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993), when it was before the Pennsylvania Supreme Court.

Alabama Family Alliance (Birmingham, AL) is a non-profit public policy research and education organization dedicated to the revitalization of American institutions in economics, education, government and the culture.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners.

American Land Rights Association (Battle Ground, WA) is a grassroots coalition of citizens in or near federally managed areas affected by federal land use and regulation.

American Loggers Solidarity (Forks, WA) is a grassroots organization made up of individuals, small businesses, corporations and elected officials in seven states.

Americans For Tax Reform (Washington, DC) is a coalition of individuals, taxpayer groups and businesses concerned with federal tax policy, spending reduction, a balanced budget and restoring accountability to elected officials.

Citizens Against Repressive Zoning (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens For Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees.

Citizens for Private Property Rights, Inc. (Sullivan, MO) is a nonprofit, grassroots organization dedicated to the defense and preservation of property rights.

Committee For A Constructive Tomorrow (Washington, DC) promotes free-market, safe-technological solutions to consumer and environmental concerns.

Conservative Caucus, Inc. (Vienna, VA) seeks to restore the federal government to its constitutional boundaries, eliminate regulations, and preserve America's national independence.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is a group of Texas citizens dedicated to the protection of private property rights.

Environmental Conservation Organization (ECO) (Hollow Rock, TN) represents 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection.

Frontiers of Freedom Institute (Arlington, VA) is a grassroots membership organization founded to promote the Constitution to ensure the maximum freedom for every American.

The Heartland Institute (Palatine, IL) is a nonprofit public policy research organization serving Heartland Members, elected officials, journalists and other opinion leaders.

Hill Country Heritage Association (Lampasas, TX) embraces the conservation of natural resources in conjunction with respect for individual property rights.

Hill Country Landowners' Coalition (Georgetown, TX) was organized in 1991 to oppose over-regulation of private property.

Independence Institute (Golden, CO) is a non-partisan, non-profit public policy organization committed to furthering the goals of freedom and individual opportunity.

Individual Rights Foundation (New York, NY) is a public interest legal organization dedicated to pursuing cases that protect individual liberty and encourage empowerment.

Land Rights Foundation (Gloversville, NY) is an educational organization dedicated to providing information concerning the right to own and enjoy property.

Maine Conservation Rights Institute (Lubec, ME) is dedicated to private property rights and private conservation, through education and research.

National Center for Public Policy Analysis (Dallas, TX) seeks to develop and promote private alternatives to government regulation and control, solving problems by relying on the strengths of the competitive, entrepreneurial private sector.

National Center for Public Policy Research (Washington, DC) promotes innovative free market solutions to environmental problems -- solutions that minimize the sacrifice of American families.

New Hampshire Landowners Alliance (Campton, NH) is a statewide organization founded to foster the conservation of natural resources in a manner consistent with constitutionally guaranteed property rights.

Northwest Legal Foundation (Minot, ND) exists to protect the rights of individuals, especially real property rights, against confiscatory government action.

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate property owners about the threat to their property rights and personal freedom posed by land use regulation.

People for the West! ACCORD Chapter (Phoenix, AZ) is a grassroots organization created to support western communities against the overreaching hand of government.

Putting People First (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature.

Stop Taking Our Property (STOP) (Porter County, IN) is comprised of over 300 families who have been impacted by government policies involving property rights.

Take Back Arkansas, Inc. (Fayetteville, AR) is a private property rights organization whose goal is to organize like-minded people at the grassroots level and provide information about property rights.

Texas Justice Foundation (San Antonio, TX) is a nonprofit, public interest, litigation foundation that protects individual rights, and promotes a better business climate.

Texas Public Policy Foundation (San Antonio, TX) is a research foundation supporting the principles of limited government, free and competitive markets, private property rights, and individual responsibility.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization formed to protect landowners rights whose members own over fifteen million acres of land.

United States Business and Industrial Council (Washington, DC) represents business leaders committed to a prosperous, competitive, and value-centered America.

STATEMENT OF THE CASE

Saint Peter's Catholic Church in the City of Boerne, Texas, was built in 1923 with 230 seats. By 1990, the church building could no longer physically accommodate its rapidly growing congregation of over 2,000 members. Nor could the church comply with recent liturgical changes brought about by Vatican II, such as having the seats arranged around the altar. Therefore, Respondent, the Archbishop of San Antonio, Texas, P.F. Flores, authorized the parish to construct a larger church with a liturgical design that would satisfy both concerns.

Accordingly, in 1993 Respondent submitted a building permit application to the Petitioner, City of Boerne, Texas, seeking permission to enlarge the church facility. However, because in 1991 the Petitioner had promulgated a historic preservation ordinance which established a historic district and included the facade of St. Peter's Church, the Petitioner denied the building permit request. Moreover, in direct response to the Respondent's permit application the Petitioner also arbitrarily included the entire church facility within the historic district thus ensuring that no enlargement (nor any

changes to the structure) of the church building could ever occur without city approval. Notably, the city's original Catholic church, built in the 1860's, has never been deemed historic or included in the historic district by Petitioner.

After lengthy negotiations during which Respondent sought to comply with Petitioner's aesthetic requirements and yet meet the religious needs of the church, Respondent filed the instant lawsuit alleging, *inter alia*, that the city's historic preservation ordinance as applied to the church, violated the Fifth Amendment's Just Compensation Clause and the parishioners' right to the free exercise of religion as protected by the Religious Freedom Restoration Act ("RFRA"). The only substantive issue ruled on by the courts below was the constitutionality of RFRA. The trial court held that RFRA was unconstitutional because it violated the doctrine of separation of powers by intruding upon the judicial branch's power to define constitutional rights. The court below reversed, upholding the constitutionality of RFRA.

SUMMARY OF ARGUMENT

The issue presented for review in this case is whether Congress has the power to enact the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* (1994). The stated purpose of RFRA is to protect "persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). However, because Respondent's right to the free exercise of religion in this case is inherently bound up with the church building itself, the protections afforded to the free exercise of religion are contingent upon the protections provided by the Fifth Amendment rights in private property.

The intersection of religious free exercise and property rights in the context of a church building is unique and results from the fact that a church is a sacred form of property. The notion that a church building is an expression of religious belief has been repeatedly recognized by courts and legal commentators. For example, in *First Covenant Church v. City of Seattle,* 840 P.2d 174 (Wash. 1992), the Washington Supreme Court *en banc* described how a church structure is, in and of itself, an expression of religious beliefs:

> First Covenant claims, and no one disputes, that its church building itself "is an expression of Christian belief and message" and that conveying religious beliefs is part of the building's function....The relationship between theological doctrine and architectural design is well recognized. . . . The exterior and the interior of the structure are inextricably related.

Id. at 182 (citations omitted).[1]

The *First Covenant* Court concluded that a historic designation of the First Covenant Church requiring that the church seek approval of a government body before it could alter the exterior of its house of worship, whether or not the alteration was for a religious purpose, unnecessarily burdened the church members' constitutional right to freely exercise their religious beliefs. *Id.* at 183.

The *First Covenant* Court was especially impressed with the fact that it was the City -- not the church leaders -- which had the ultimate control over whether it would allow any architectural change to the structure of the church: "[I]t is clear that the City reserves the right to oversee and challenge

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[1] *See also* Thomas Pak, Note, *Free Exercise, Free Expression, and Landmark Preservation*, 91 Colum. L. Rev. 1813, 1840-43 (1991); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401, 490-98 (1991).

First Covenant's decisions about what is liturgy and what is a valid religious purpose." *Id.* at 184.

By the same token, the Petitioner in this case likewise holds the ultimate authority to make decisions regarding the structure of Respondent's church, even if Respondent decides (as he has in this case) that such structural changes are necessary for religious purposes. But, since editing the edifice of a church is like editing the Bible or a sermon, the application of a historic preservation ordinance to a church -- however aesthetically pleasing the church building may be -- burdens religious free exercise.

Moreover, since this ordinance concerns a building, the free exercise issue must be analyzed in the context of well-established constitutional principles of property rights protection. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that in order to survive Fifth Amendment scrutiny, an ordinance which affects even ordinary private property (such as a home) must: (1) substantially advance a (2) legitimate governmental purpose. *Id.* at 834.

Applying this intermediate level of scrutiny to the record below in the instant case reveals that there was little or no historical basis -- architectural or otherwise -- for designating the Saint Peter's Catholic Church historic. Rather, the record below suggests that the inclusion of first the facade, then the inclusion of the entire church within the historic district was arbitrary.[2] Thus, it is highly doubtful that Petitioner could meet the heavy burden imposed by this Court in *Nollan* of showing that the designation of the church building " substantially advanced" the stated purpose of the historic preservation ordinance.

However, because the property involved in this case is a church, which is itself an expression of religious beliefs, the standard which must be met to achieve a legitimate government purpose must be higher than that for ordinary

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[2] Excerpts from the deposition of Christopher Turk, Director of Planning & Community Services for the City of Boerne, pp. 25-26:

Q. What was the criteria for establishing the Historic District?
A. This line on the map.
Q. What was the criteria for establishing that line?
A. When the line was drawn, keeping in mind or try to keep in mind where the structures were, but I ended up, to keep it straight as possible. . . .
Q. Now, Mr. Turk, you have told me the steps that were taken so there could be a straight line encompassing the district. What was the reason for having a straight line?
A. I don't have a reason.

property. That is, unless there is a legitimate health and safety threat shown to be addressed by the historic designation, its application to a church cannot be sustained. *See First Covenant*, 840 P.2d at 185, *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996).

Having concluded that the historic designation of the church cannot satisfy the Fifth Amendment's standards, the historic designation of the church cannot satisfy review under RFRA and the free exercise clause of the First Amendment.

ARGUMENT

I. Petitioner's Ordinance Limiting Respondent's Right To Build A New Church On His Property Fails To Comport With The "Essential Nexus" Test Established By This Court In *Nollan*.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that in order for the government to justify any land use regulation which affects property rights, government must show that the regulation "substantially advances" its stated purpose. *Id.* at 834. Absent that relationship or "nexus" between the stated governmental

purpose and the governmental restriction, the "evident constitutional propriety disappears." *Id.* at 837. Or, as Justice Scalia, analogizing to another First Amendment right, put it:

> When that essential nexus is eliminated, the situation becomes the same as if California forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Id. See also Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (holding that "essential nexus" test requires permit conditions be roughly proportional to the impact of proposed activity).

This heightened or intermediate level of scrutiny has been applied elsewhere by lower courts to secular properties and the analysis in those cases is instructive for the case at bar. For example, in *Seawall Associates. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals held that the stated purpose of relieving homelessness

was not served by the local ordinance which prohibited property owners from demolishing, altering or converting single-room occupancy properties and obligated them to restore all units to habitable condition. The ordinance further required them to lease the units at controlled rents for an indefinite period. The Court in *Seawall* held that these ordinances failed to "substantially advance" its putative purpose of relieving homelessness and thus violated the Fifth Amendment. *Id.* at 1068-69.

In *Richardson v. City and County of Honolulu*, 797 F. Supp. 1477 (D. Haw. 1991), the United States District Court for the District of Hawaii held that an ordinance setting a rent ceiling on renegotiated leases for residential condominiums was an unconstitutional taking because it did not "rationally further the goal of reducing the cost of leasehold housing for the people of Hawaii while providing a fair return for lessors." *Id.* at 1496. The court further found that the ordinance did not substantially advance its stated purpose in large part because it was overbroad, regulating not only residential condominiums occupied by lessees, but also a

much larger group of condominiums not occupied by lessees. *Id.* at 1494.

In this case, the stated primary purpose of the City of Boerne Historic Landmark Preservation Ordinance No. 91-05 is:

> To protect, enhance and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's and State's architectural, archeological, cultural, social, economic, ethnic and political history and to develop appropriate settings for such places.

(Cert. Pet. App. at 47a.)

It is difficult to see how the inclusion of the Saint Peter Catholic Church within the historic district helps to further this purpose since the Saint Peter Church itself has not been declared a historic landmark under the ordinance. Additionally, the construction of a new church on the same site would not destroy surrounding buildings, which may or may not be historic landmarks. Therefore, preventing the demolition of the existing Saint Peter's Church will not, either directly or indirectly, preserve a single building deemed a historic landmark by the Petitioner.

In short, there is little to suggest that the inclusion of the Saint Peter's Catholic Church within the historic district is

substantially related to the purpose of historic landmark preservation as is required by this Court in *Nollan*. Therefore, this case could be decided in favor of Respondent without even considering the application of RFRA. Because of the religious nature of Respondent's property, however, RFRA may be applied, and provides an even higher burden for Petitioner to meet in justifying the restrictions on Respondent's property.

II. RFRA Is, In Part, A Property Rights Statute For Churches.

At bottom, whether Respondent's right to free exercise of religion is substantially burdened depends directly upon whether its property rights have been violated. The especially high level of protection that must be afforded to Respondent's property as a church directly reflects its religious nature.

Contrary to Petitioner's suggestion that RFRA is merely an attempt to overrule this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), RFRA in fact protects several constitutional rights simultaneously. In this case specifically,

at issue is the combined right involving the protection of private property and free exercise of religion. As this Court explained in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993), "[i]ndividual freedom finds tangible expression in property rights." In this case, it is the specific individual freedom of religious free exercise which finds tangible expression in property rights.

The plain fact is that a church building is itself an expression of religious belief and not merely a structure within which religious conduct occurs. Thus, and as reflected in RFRA, the validity of the historic designation must survive an even higher standard of scrutiny uniquely appropriate for a church.

Courts considering this issue in the past have held that church building design is a form of religious expression. In *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992), the Washington Supreme Court held that the designation of a church building as a historic landmark violated the church's First Amendment right to free exercise of religion. On facts similar to the present case, the City of Seattle passed the Landmarks Preservation Ordinance, under

which the First Covenant Church was designated as a historic landmark. This designation meant that exterior changes to the church had to be approved by the city's Landmark Preservation Board.

The Washington Supreme Court found that the city could not show a sufficiently compelling interest in regulating the exterior structure of churches to warrant the limitation of First Covenant Church's free exercise rights:

> We hold that the City's interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.

Id. at 185.

In *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996), the United States District Court for the District of Maryland held that the City of Cumberland's refusal to grant a demolition permit for a monastery on historic preservation grounds was a violation of the church's right to free exercise of religion under the First Amendment on the theory that a decision to demolish an existing religious

structure and replace it with another religious structure was an expression of religious faith.

Finally, in *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994), the United States District Court for the District of Columbia held that RFRA prevents a city from, under normal circumstances, interfering with religious activities:

> Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion.

Id. at 546.

It might be argued that *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), provides a contrary view to the holdings in *First Covenant* and *Keeler* regarding city interference with church construction. In *St. Bartholomew*, the Second Circuit found that the application of a historic preservation ordinance to church-owned commercial property did not *per se* violate the First Amendment guarantee of free exercise of religion. *Id.* at 354.

St. Bartholomew, however, can be easily distinguished because the building at issue there was a commercial office building to be built on church-owned property, not a church, or other kind of building intended for religious use. Clearly, a commercial office building, even if located on church property, does not involve religious activity, and consequently does not express religious faith through its design.

Moreover, where compelling interests, such as health and safety, are at stake, this Court has repeatedly upheld some regulations restricting the exercise of fundamental rights. Thus, to the extent that zoning or land use regulations reflect safety and health concerns, then those regulations, even when applied to a church, would pass constitutional muster. *See, e.g., Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1989)(holding that compelling interest test applies to zoning regulations affecting churches). Also, regulations affecting churches would not violate RFRA or constitutional provisions where no liturgical elements are included within the scope of the regulation. For example, normal zoning and building code regulations

pertaining to such concerns as setbacks and parking may still be applied to church buildings under RFRA and the constitution since they do not affect the design or other liturgical elements of the church.

A. The advancement of historic preservation is not a compelling state interest.

RFRA allows the government to substantially burden a person's free exercise of religion only if it furthers a compelling state interest by the least restrictive means. 42 U.S.C. § 2000bb-1(b). While this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) found that landmark preservation represented an legitimate state interest, it did not express the view that it constituted a compelling state interest. "Landmark preservation laws constitute a legitimate use of police power to maintain the aesthetic and cultural features of a community. Such ordinances do not represent efforts by the government to further its interests in the health and safety of its citizens." *First Covenant Church v. City of Seattle*, 787 P.2d 1352,

1361 (Wash. 1990), *vacated on other grounds,* 499 U.S. 901 (1991)(*construing Penn Central*).

Thus, in constitutional terms, there is a hierarchy among purposes for which a government may legitimately act. Greater burdens may be imposed in protecting health and safety concerns and in preventing nuisances. Aesthetic concerns, important as they may be, rank lower in this hierarchy of police power objectives and thus justify only less burdensome regulations. As explained by the court in *First English* upon remand from this Court:

> In *Agins* the public purpose advanced was the interest in preventing premature urbanization . . . . The Supreme Court might have difficulty finding that this public purpose would justify depriving a landowner of "all use" of his property. However, the Supreme Court recognized the public purpose in *First English* is far different -- the preservation of lives and health. It would not be remarkable at all to allow government to deny a private owner "all uses" of his property where there is no use of that property which does not threaten lives and health. So it makes perfect sense to deny compensation for the denial of "all uses" where health and safety are at stake but require compensation for the denial of "all uses" where the land use regulation advances lesser public purposes.

First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 901 (Cal. App. 2d 1989), *cert. denied*, 493 U.S. 1056 (1990).

In this case, lesser concerns are at stake: the preservation of a church facade which is at best a matter of aesthetic concern. While aesthetic concerns may well be legitimate public purposes, they cannot reasonably be represented as issues affecting public health and safety. This purpose does not justify the imposition of the burdens imposed on this church building, nor the infringement of the church member's civil rights.

B. The city's requirement that no demolition of the church occur was not the "least restrictive" means of historic preservation.

The City of Boerne's requirement that no part of Saint Peter's Church be demolished, (J.A. at 39), is not the least restrictive means of achieving the City's historic preservation goals in this case.

As the Petitioner states in its brief, the alleged historical significance of Saint Peter's Church to the City of Boerne is based on its architecture. (Pet'r Br. at 2.) The stated purpose to be achieved by the City's historic landmarks

ordinance is to "protect, enhance and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's . . . architectural . . . history." (Cert. Pet. App. at 47a.) By establishing a historic district, the City seeks to further the aesthetic purpose of preserving the external architecture of buildings. The City was especially concerned with changes to the facades of structures that faced a street within the historic district. (J.A. at 26-29.)

When the historic district was created in 1992 the boundary bisected Saint Peter's Church so that its facade fell within the district, but not the remaining portion of the church. (J.A. at 6, 68.) The front of the Saint Peter's Church has a Spanish mission-style facade with twin bell towers made of stone. Thaddeus Herrick, *Court sides with church to raze sanctuary*, The Houston Chronicle, Jan. 25, 1996, at A26; *Appeals Court Upholds Church's Right to Destroy Historic Sanctuary*, AP, Jan. 24, 1996, *available in* LEXIS, Nexis Library, AP File. The church sits on a hill and is easily seen as one enters the City of Boerne. (Pet'r Br. at 2.) Thus, if anything sets the church apart from other buildings it is because of its bell towers. This is the only rational

explanation for the historic district's boundaries, which included the facade, but not the rest of the church. There is no indication that any other part of the exterior of the Church was considered architecturally significant by the City. Even the City's criteria used to justify inclusion of the church's facade within the historic district, (J.A. at 39), relate to seeing the mission revival architecture of the twin stone bell towers on the hill where the church is located. (Pet'r Br. at 2.)

If there is any architectural significance to the Church's facade, which remains in dispute, (J.A. at 72), the City's requirement that no part of the Saint Peter's Church be demolished is the most restrictive means of achieving the City's goal of architectural preservation in this case, not the least. At a minimum, the least restrictive means would be to preserve the facade of Saint Peter's Church. In fact, Archbishop Flores undertook plans to preserve the facade and hide the enlarged church behind it at additional expense. (*See* J.A. at 7, 8.) However, the City denied the building permit and then expanded the City's historic district in 1994 to include the entire church structure. (J.A. at 70-71.) Prohibiting all external changes to the church is not the least

restrictive means of furthering the architectural purpose of the ordinance or the historic district based on the facts of this case.

CONCLUSION

For all of the foregoing reasons, *amici curiae* urge this Court to affirm the decision below.

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January 10, 1997

(38)

No. 95-2074

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS

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QUESTIONS PRESENTED

Amicus curiae State of Texas will address the following question (question "2." as set forth in the *Brief of Petitioner*):

> Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

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INTEREST OF AMICUS CURIAE STATE OF TEXAS

The State of Texas files this *amicus curiae* brief on behalf of the state and its citizens in order to protect the Free Exercise rights of its citizens under the First Amendment (as incorporated into the Fourteenth Amendment) and the Religious Freedom Restoration Act.

SUMMARY OF ARGUMENT

The Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution establish the appropriate balance between the federal and state governments, *i.e.*, appropriate federalism. Appropriate federalism (or, as referred to herein, the Federalism Framework), however, is not aimed at merely protecting the rights and powers of states *qua* states, or to protect states as abstract entities. Rather, it seeks to protect the fundamental rights and liberties of our citizens by checking the abuses of governmental power at any level.

The Fourteenth Amendment fundamentally altered the balance between the federal and state governments. It did so, however, in order to provide further protection for the rights and liberties of our citizens.

Nonetheless, not all legislation putatively passed pursuant to the Fourteenth Amendment is constitutional. Legislation that violates other provisions of the Constitution, or violates the "spirit" of the Constitution is unconstitutional.

The Religious Freedom Restoration Act ("RFRA") was passed in 1993 pursuant to the Fourteenth Amendment. Congress sought to reestablish the "strict scrutiny" test for governmental action that affected the free exercise rights of our citizens. According to Congress, the Court had eviscerated this test in *Employment Division v. Smith* in 1990.

Petitioner has argued, *inter alia*, that RFRA violates federalism by overriding the will of duly elected local officials and commandeering state resources to fulfill federal policy. The State of Texas files this *amicus* brief because it believes that RFRA does not violate the "letter

or spirit" of the Constitution. It certainly does not commandeer state resources to effectuate federal policy. Rather, it assures that the promise of this country to generations of immigrants regarding religious freedom remains untrammeled by government at any level -- federal, state, or local.

Thus, RFRA does not violate our federalism. Rather, it fulfills the ultimate objective of federalism, *i.e.*, the protection of the fundamental rights and liberties of our citizens.

ARGUMENT

Background

Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993.[1] Essentially, RFRA reestablished the "compelling interests"/ "least restrictive means" test (*i.e.*, the "strict scrutiny" standard of review of governmental action) set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972).

Under this standard of review, with regard to zoning disputes, such as the one at issue in this case, the courts had established an increased scrutiny test for determining when governmental action unconstitutionally impacts on First Amendment rights. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, 103 S.Ct. 505, 509-510 (1982); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 n.7, 101 S.Ct. 2176, 2183 n.7 (1981)("When . . . a zoning [law] infringes upon [a protected] first amendment [liberty], . . . it must be narrowly drawn [and must further a sufficiently] substantial government interest."). *See Islamic Center of Mississippi, Inc. v. City of Starkville, Mississippi*, 840 F.2d 293, 299 (5th Cir. 1988).

According to the text[2] and legislative history of RFRA, the enactment of RFRA was prompted by the Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110

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[1] 42 U.S.C. § 2000bb, *et seq.* (1993).

[2] 42 U.S.C. § 2000bb(a)(4).

S.Ct. 1595 (1990). That decision, according to Congress, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion. . . ."[3]

Furthermore, according to legislative history, RFRA was enacted pursuant to Section 5 of the Fourteenth Amendment.[4] Nothing in the *text* of RFRA, however, states that it was enacted pursuant to the power of Congress provided for by Section 5 of the Fourteenth Amendment.

In attempting to have RFRA set aside as unconstitutional, Petitioners argue, *inter alia*, that RFRA:

> . . . is a bold and unprecedented example of federal social policy engineering that commandeers the states to follow the federal government's decision to accommodate religion more than the Constitution requires. Thus, it violates core constitutional principles of federalism in the Tenth Amendment. [citation omitted.] Congress is a body of enumerated powers, and it must respect state integrity in that exercise. [citations omitted] . . . Congress has done in RFRA what--in our constitutional scheme--only the states may do themselves . . . Because of its expansive sweep, RFRA colors every dealing a state or municipality has with every religious believer, church, or religious organization.[5]

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[3] *Id.*

[4] *See* H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993); S. Rep. No. 111, 103d Cong., 1st Sess., at 13-14 (1993), *reprinted* in 1993 U.S.C.A.A.N. at 1903.

[5] *Petition for Certiorari*, pp. 7 to 10.

Furthermore, in Section 3 of Part II of the *Brief of Petitioner*, Petitioner argues that RFRA "violates the principles of federalism reflected in the Tenth Amendment and operating as an inherent constitutional limitation on the exercise of Section Five authority against the states." *Brief of Petitioner* at 46.

State of Texas files this *amicus* brief in order to respond to these federalism arguments. Texas has a great concern about the proper application of the doctrine of federalism.[6] The State's concern about appropriate federalism, moreover, is at its apogee when Congress putatively acts pursuant to its powers under Section 5 of the Fourteenth Amendment and its actions impact upon state sovereignty and state and local self-government.

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[6] For example, the State has spent enormous resources during the past five years to ensure that federal bureaucrats and federal judges do not take control--pursuant to over expansive views of the Endangered Species Act --of the water and land resources owned by Texas citizens and managed in accordance with the will of Texas citizens and the Texas legislature. *See Sierra Club v. Babbitt*, 995 F.2d 571, *Sierra Club v. Glickman*, 82 F.3d 106, *State of Texas v. Babbitt*, No. W94CA271 (U.S.D.C. filed Sept. 30, 1994), *SOS v. Babbitt*, No. MO95CA230 (U.S.D.C. filed Oct. 20, 1995).

Also, the State has sought to ensure that the federal government, and not the state government or its citizens, pays the costs of the federal government's failed immigration policies and failure to responsibly reimburse state and local governments for the costs associated with illegal immigration. *See State of Texas v. United States*, 1996 WL 411490 (D.D.C. July 15, 1996), appeal pending.

Texas' defense of federalism has not been undertaken because of theoretical or abstract "states' rights" reasons or motives, but rather because of the State's deep concern that the rights and powers of Texas citizens (such as our citizens' property rights or their right to elect officials who can be held accountable to them and who reflect their concerns and viewpoints) not be needlessly eviscerated by overreaching federal officials or by the federal judiciary over-expansively reading federal laws and regulations.

In this case, however, Texas does not agree that there are sufficient negative impacts on state self-government that justify a lower level of constitutional protection for our citizens as they seek to freely exercise their First Amendment religious rights. It can be discerned when state sovereignty and self-government are truly at risk and when they are not. With all due respect to our sister states who argue differently, and, indeed, to the Petitioner, they are not at stake in this case.

RFRA does not unconstitutionally impinge on state and local self-government. Despite assertions to the contrary, state and local self-government will not grind to a halt if state and local governments remain duly solicitous of our citizens right to worship. State and local governments, furthermore, will not be courting "anarchy"[7] by following a careful course of utmost scrutiny as they undertake governmental action that impacts upon religious worship.

In this case, Texans' right to worship and to freely exercise their religion is being protected by RFRA and there are no correlative "commandeerings" of state or local governments that run afoul of the "Federalism Framework" described *infra*.

Furthermore, RFRA-based lawsuits in the larger context are not an onerous set of lawsuits with which to deal. In general, the State of Texas Office of the Attorney General handles approximately 26,000 active cases at any one time. Of these, approximately, 2200 are inmate-related, non-capital punishment cases. Of these 2200 inmate-related cases, approximately 60 are RFRA-related. Thus, RFRA-related cases represent .23 percent (that is, one-quarter percent) of the entire caseload of the Texas Attorney General's office, and about 2.7 percent of the inmate-related (non-capital punishment) caseload of the State of Texas. Moreover, of

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[7] *See Employment Division v. Smith*, 494 U.S. at 888, 110 S.Ct. at 1605.

the approximately 60 RFRA-related cases, many of these are frivolous to be dispensed summarily.

To be sure, Texas remains concerned about frivolous lawsuits brought by inmates. Convicts in prisons, however, will always find other bases for bringing junk lawsuits. The free exercise rights of millions of Texans, in any event, should not be held hostage to a few dozen convicts looking for excuses to bring a lawsuit.[8]

Furthermore, Texas notes that RFRA, by reestablishing the compelling state interest/least restrictive means test, preserves the ability of Texas to administer its prison program in a way that will ensure that the health and safety of prison officials and convicts will be protected. Strict scrutiny in the prison context will not be "fatal" scrutiny in fact.[9]

Lastly, it is critical to note that RFRA does not present an absolute bar to the application of state and local governmental regulations and law to religious entities. It only reestablishes the strict scrutiny test *ante Employment Division v. Smith*. As noted earlier, under RFRA, governmental regulations that apply to religious entities must serve a compelling purpose and be found to use the least restrictive means to accomplish their purpose.

Regulations that are at the core of governmental legislation such as building codes, electrical codes, plumbing codes, health codes, and traffic regulations are not *a fortiori* invalid under the standard. These type of regulations by their very nature and relation to public safety may be found by the courts to serve a compelling public interest.

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[8] Texas obviously acknowledges that there *may* be legitimate bases for incarcerated individuals bringing RFRA-based lawsuits.

[9] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. ___, __, 115 S.Ct. 2097, 2118 (1995).

Local governments can also generally show a compelling interest for other regulations that implicate health and safety concerns such as setback requirements that allow public access to properties in case of emergencies. *See City of Corpus Christi v. Unitarian Church of Corpus Christi*, 436 S.W.2d 923 (Tex.Civ.App.--Corpus Christi 1968, writ. ref'd n.r.e.).

In sum, it is important to recognize that this Court has "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact.' [*Fullilove v. Klutznick*, 448 U.S. 448, 519 100 S.Ct. 2758 (1980)(MARSHALL, J., concurring in judgment)]." *Adarand Constructors, Inc. v. Pena*, 515 U.S. at ___, 115 S.Ct. 2097, 2117.

I. THE FEDERALISM FRAMEWORK: THE TEXT AND STRUCTURE OF THE CONSTITUTION, AS AMENDED BY THE TENTH AMENDMENT, ESTABLISH THE APPROPRIATE BALANCE BETWEEN THE FEDERAL AND STATE GOVERNMENTS.

The question with respect to the appropriate balance of power between the states and the federal government is "as old as the Constitution." *New York v. United States*, 505 U.S. 144, 148, 112 S.Ct. 2408, 2414 (1992). The United States is a government of limited, enumerated powers. *United States v. Lopez*, 514 U.S. ___, ___, 115 S.Ct. 1624, 1626 (1995). *See* U.S. CONST., ART I. § 8.

On the other hand, the myriad rights and powers of the states are preserved textually by the Tenth Amendment[10]

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[10] The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

and the Guarantee Clause,[11] as well as embedded in the structure of the Constitution.[12] By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution establishes a framework in which the states retain "substantial sovereign authority." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399 (1991). *See Oregon v. Mitchell*, 400 U.S. 112, 201, 91 S.Ct. 260, 303 (1970)(HARLAN, J.)("When the Constitution with its original Amendments came into being, the States delegated some of the sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amdt. X.")

In *New York v. United States* 505 U.S. at 156, 112 S.Ct. at 2417, the Court set forth the significance of the Tenth Amendment:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

In *New York v. United States*, the Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[13] because the provision

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[11] U.S. CONST. art. IV, § 4 (the "Guarantee Clause"), provides that "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."

[12] *See Nevada v. Hall*, 440 U.S. 410, 433, 99 S.Ct. 1182, 1194 (1979) (REHNQUIST, J., joined by BURGER, C.J., dissenting).

[13] Pub. L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021b(1988).

commanded states either to enact laws regulating the disposal of low-level radioactive waste or to take title to all low-level radioactive waste generated within their borders.

The Court in *New York* distinguished firmly between Congressional power "to pass laws requiring or prohibiting certain acts" by private parties and congressional attempts "to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166, 112 S.Ct. at 2423.[14] Congress does not have the power to compel state governments to do certain things or to take certain actions. Congress, furthermore, cannot commandeer state governmental power to act in lieu of the federal government. While those propositions should have been self-evident for some time, they were not clearly reaffirmed until the *New York* case.

The Guarantee Clause furthermore ensures that state governments are held accountable to the citizens of the respective states with respect to fundamental decisions about how to allocate, control, and use resources and define, maintain, protect, or regulate the rights and powers of its citizens.[15] The essence of a "republican form" of government is a close fit between the choices and desires of citizens and the actions and decisions of the officials they elect. That is, the accountability of elected officials to the electorate is the *sine qua non* of a republican form of government.

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[14] Deborah Jones Meritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 815, 818 (1994).

[15] In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742,761, 102 S.Ct. 2126, 2138 (1982), the Supreme Court acknowledged that "the authority to make . . . fundamental . . . decisions is perhaps the quintessential attribute of sovereignty. [citation omitted]. *FERC* 456 U.S. at 761, 102 S.Ct. at 2138. The Court stated further: Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. [citation omitted]. *Id.*

Federal mandates, whether from Congress in the form of legislative enactments or decreed by administrative fiat in the form of agency action, may sever the link between the citizens of a state and their elected officials. If the federal government does sever that link, then the federal government not only has failed its constitutional duty to protect the states' republican form of government, it has necessarily impinged upon the states' right to a "republican form" of government guaranteed by the Constitution.

The vitality of the Guarantee Clause in bolstering the Federalism Framework (described *supra*) was renewed in *New York,* in which the Court acknowledged that the Guarantee Clause could be used to protect states from an over-intrusive federal government. *New York,* 515 U.S. at 182-183, 112 S.Ct. at 2432-33. Actions brought by states to protect their sovereignty and which allege violations of the Guarantee Clause cases are justiciable. *See Reynolds v. Sims*, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392 (1964) ("*some* [not all] questions raised under the Guaranty Clause are nonjusticiable.")(emphasis added).

The reinvigoration of the Guarantee Clause, and whether it is enforceable has recently been the subject of much academic discourse. *See* Jesse H. Choper, *Observations on the Guarantee Clause - As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 UNIV. OF COLO. L. REV. 741 (1994); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 UNIV. OF COLO. L. REV. 749 (1994); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 815 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 UNIV. OF COLO. L. REV. 849 (1994); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 887 (1994).

II. The Ultimate Objective of the Federalism Framework: Protecting the Fundamental Rights and Powers of Citizens.

It is critical to note that preserving the Federalism Framework as described *supra* is not simply an abstract "states' rights" goal. Rather, as the Court has recognized, the Federalism Framework protects the fundamental rights and powers of citizens. "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400 (1991)." *United States v. Lopez*, 514 U.S. at 1626.

In *Gregory*, the Court stated:

> "Perhaps the principal benefit of the federalist system is a check on the abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[16]

And in *New York v. United States*, 505 U.S. at 181, 112 S.Ct. at 2431 (citations and quotation marks omitted) (emphasis added), the court stated:

> The Constitution does not protect the sovereignty of the States . . . or state governments as abstract political entities, or

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[16] *Gregory* at 458. The Court relied heavily upon Nos. 28 (Hamilton) and 51 (Madison) of THE FEDERALIST (C. Rossiter, ed. 1961).

> even for the benefit of the public officials governing the States. *To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.* State sovereignty is not just an end in itself. "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." [citation omitted].

Furthermore, as noted by Justice Blackmun in *Coleman v. Thompson*, 501 U.S. 722, 760-761, 111 S. Ct. 2546, 2570 (1991) (1991)(BLACKMUN, J. dissenting):

> . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power. Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions.' (quoting William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961)).

Moreover, with regard to the Guarantee Clause, although the promise of the Guarantee Clause appears on its face to flow to the states *qua* the states, the Court has stated that the beneficiaries of the guarantee are the people. *Texas v. United States*, 74 U.S.(7 Wall.) 700 (1869). *See* Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 887, 920 (1994).

III. The Fourteenth Amendment Was Intended to Advance the Ultimate Objective of Federalism.

The Federalism Framework protects the rights and liberties of our citizens by ensuring the appropriate balance of power between the state and federal governments. Against the original framework of the Constitution (including the Guarantee Clause) and the Bill of Rights (including the Tenth Amendment), as well as against the backdrop of the Civil War, the Fourteenth Amendment fundamentally altered the balance between the federal and state governments. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1125 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490, 109 S.Ct. 706, 720 (1989); *Fitzpatrick v. Blitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 2671 (1976). This alteration, nonetheless, was meant to provide more protection for fundamental liberties and rights of our citizens. From this perspective, the Fourteenth Amendment furthers the ultimate objective of federalism.

The Fourteenth Amendment "contained prohibitions expressly directed at the States and § 5 of the Amendment expressly provided that 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article' [citation omitted]." *Seminole Tribe* at 1125.[17] Indeed, the Court has stated that the Fourteenth Amendment was one of three constitutional amendments[18] that "were specifically designed as an expansion of federal power and

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[17] The Court went on to state: "[T]hat through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole* at 1125.

[18] The others being the Thirteenth and Fifteenth Amendments.

an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179, 100 S.Ct. 1548, 1563 (1980).

While RFRA was putatively enacted pursuant to the Fourteenth Amendment,[19] Congress did not expressly state in the act itself that it was acting pursuant to that constitutional provision. That is unfortunate, but not fatally defective to the legislation. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18, 103 S.Ct. 1054, 1064 n.18 (1983) (legislation enacted pursuant to Congress' Section 5 authority is valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of the power."); *see also Fullilove v. Klutznick*, 448 U.S. 448, 477, 100 S.Ct. 2758, 2774 (1980) (plurality).[20]

While the Court has fortunately (from the state perspective) been moving toward "plain statement" or "clear

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[19] While the text of RFRA does not formally set forth the ostensible power being relied upon by Congress to enact RFRA, RFRA's legislative history indicates that Congress relied upon the Fourteenth Amendment to enact RFRA. S. Rep. No.111, 103d Cong., 1st Sess., 13-14 (1993), reprinted in 1993 U.S.C.A.A.N. 1892; H.R. No. 88, 103d Cong., 1st Sess. 9 (1993).

[20] *See United States v. Lopez*, 514 U.S. at __, 115 S.Ct. at 1631-1632, with respect to whether certain activities affected interstate commerce, the Court stated:

> We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. [citations omitted.] But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

statement" rules in a number of contexts[21] in order to ensure, *inter alia*, political accountability of the federal government, there appears to be no requirement at this time that Congress must clearly set forth the basis of its power to enact certain legislation in the legislation itself.

IV. Despite The Ultimate Objective of the Fourteenth Amendment To Protect Fundamental Rights and Powers of Our Citizens, It Does Not Provide Carte Blanche To the Federal Government To Run Roughshod Over State and Local Governments.

While the Fourteenth Amendment clearly readjusted the balance of power between state governments and the federal government,[22] the Court has recognized that the

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[21] *See Gregory v. Ashcroft*, 501 U.S. 452, 460-461, 111 S.Ct. 2395, 2401 (1991)("We explained recently: '[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must [do so] 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, [105 S.Ct. 3412, 3147, 87 L.Ed. 2d 171] (1995); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [104 S.Ct. 900, 907, 79 L.Ed. 2d 67] (1984).").

With respect to Eleventh Amendment state sovereignty abrogation issues, the Court has declared that "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' [*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S.Ct. 2578, 2584 (1991)]." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. at 1123.

[22] Actually, the Fourteenth Amendment specifically expanded the power of *Congress*. "It is not said [in section 5 of the Fourteenth Amendment] the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . .

Fourteenth Amendment does not override all principles of federalism. *Gregory v. Ashcroft*, 501 U.S. 452, 468, 111 S.Ct. 2395, 2405 (1991). As the Court stated: "[T]his Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers." *Id.*

In *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970), Justice Black explained that Congress' enforcement power under Section 5 of the Fourteenth Amendment, while broad, is not unlimited and set forth a three-part test for analyzing the power of Congress under the Fourteenth Amendment:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'

Id. at 128-29, 91 S.Ct. at 266-267 (opinion of BLACK, J.). *See also State of South Carolina v. Katzenbach*, 383 U.S. 301, 325, 86 S.Ct. 803, 816-817 (1966).

It is the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1879)(emphasis added in part).

In *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-1724 (1966), the Court had set forth a simpler two-part test. As described in *City of Rome*, 446 U.S. at 176, 100 S.Ct. at 1561:

> In [*Katzenbach*], the Court held that legislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment [1] 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and [2] 'is not prohibited by but is consistent with 'the letter and spirit of the constitution,'. . . (quoting *McCulloch v. Maryland*, [4 Wheat. 316, 421, 4 L.Ed. 579 (1819)].

In this case, the Fifth Circuit Court of Appeals appropriately adopted the *Morgan/Mitchell* analysis in order to evaluate whether Congress had the constitutional authority to enact RFRA, aimed as it is at enforcing § 5 of the Fourteenth Amendment. *P.F. Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1358 (5th Cir. 1996). In analyzing whether legislation, such as RFRA, ostensibly passed pursuant to the Fourteenth Amendment, is constitutional, the Court must consider the following factors:

> (1) First, the statute under consideration must be "'regarded' as an enactment to enforce the Fourteenth Amendment";
>
> (2) Second, the statute must be "plainly adapted" to enforce the Amendment. *Id.* at 1359; and
>
> (3) Finally, the statute must be "consistent 'with the letter and spirit of the constitution.'" *Id.* at 1361.

An analysis of RFRA indicates that the statute does not fail any of the parts of the *Morgan/Mitchell* factors.

V. Because RFRA Is Consistent With the Federalism Framework, As Well as With the Ultimate Objective of The Federalism Framework, RFRA is Consistent with the Letter and Spirit of the Constitution With Regard to Federalism Issues.

According to the legislative history of RFRA, RFRA was passed pursuant to the Fourteenth Amendment.[23] Assuming *arguendo* that RFRA, furthermore, is "plainly adapted" to meet the purposes of the Fourteenth Amendment, there remains only the issue of whether RFRA "is not prohibited by but is consistent with the 'letter and spirit of the constitution.'" *City of Rome*, 446 U.S. at 176, 100 S.Ct. at 1561 (quoting *McCulloch v. Maryland* at 421).[24]

More specifically, the appropriate inquiry with respect to the federalism issues in this case is whether RFRA violates any textual provision of the Constitution or the inherent structure of the Constitution as described in Section I, *supra*. The inquiry into the issue whether Congress has the authority (*vis à vis* the states) under the Fourteenth Amendment to enact RFRA is the "mirror image" of the issue whether certain sovereignty rights and powers of the states have been impinged upon by Congress in enacting RFRA. *See New York*, 505 U.S. at 156, 112 S.Ct. at 2417.

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[23] *See* fn. 4 *supra*.

[24] It is to be noted that Texas does not take a position as to whether RFRA violates separation of powers principles at the federal level.

Petitioner argues strenuously that the limits on the federal government flowing from the Federalism Framework described *supra*:

> . . . are transgressed by RFRA. Tests of compelling interest and least restrictive means dramatically skew the balance of power between local governments and churches on land use issues, including historical preservation, to the detriment of this traditional area of local autonomy. *See* Cert. Pet. at 6-7. In the end, RFRA tips "the scales too far" in favor of the federal government and in derogation of the states. [citations omitted]. *Brief of Petitioner* at 45.

RFRA, however, does not transgress textual or structural limits on the federal government contained in the Constitution. Indeed, RFRA, because it is intended to protect a fundamental right or liberty of our citizens, can be characterized as fulfilling the ultimate objective of the Federalism Framework as described *supra*.

A. There Are No State or Local Government Interests That Are Needlessly, or Unconstitutionally Sacrificed by RFRA.

RFRA *appears* to implicate two sets of issues impacting on appropriate federalism, or rather on the appropriate balance between state and federal governments.

1. State and Local Governments' Right and Power to Protect, Maintain, and Regulate Property.

There is little doubt that, with regard to protecting citizens' property and self-governing rights and powers, state and local governments are responsible and "charged" under the Federalism Framework with enacting, maintaining, and enforcing laws that protect and regulate property.

"'Property interests, of course, are not created by the Constitution,' but rather 'by existing rules or understandings that stem from an independent source such as state law.' *Board of Regents of State Colleges v. Roth*, 408 U.S. 574, 577, 92 S. Ct. 2701, 2709, 33 L.Ed. 548 (1972). [other citations omitted]." *Delaware v. New York*, 507 U.S. 490, 501-502, 113 S. Ct. 1550, 1557 (1993).[25]

Furthermore, pursuant to the police power reserved to the states and protected by the Constitution, state and local governments are particularly responsible and entitled to enact, maintain, and enforce laws governing the use of land, water, and resources such as laws regarding zoning, including zoning to protect historical structures, and land use planning.[26] There is much interplay between these two sets of powers reserved to

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[25] Real property law, furthermore, has been recognized by the Court as a matter of special concern to the states. *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982).

[26] With respect to zoning, this Court has stated "[Z]oning laws and their provisions. . . are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n.18, 95 S.Ct. 2197, 2210, n.18 (1975). And with regard to land use planning, this Court has stated: "[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Reality Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)." *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994).

Indeed, the Court has recognized that the states' land use planning powers are formidable even as against the federal government. In *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 593, 107 S.Ct. 1419, 1431 (1987), the Court stated: "[T]he Property Clause gives Congress plenary power over the federal land at issue; however, even within the sphere of the Property Clause, state law [*i.e.*, the state land use planning law at issue] is preempted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.' [citation omitted]."

state and local government. But RFRA does not impinge upon these two important powers of state and local governments.

Nothing in RFRA commands states to do anything with regard to defining, maintaining, or protecting property rights. Nothing in RFRA diminishes the powers of state and local government with respect to defining, maintaining, or regulating property.

Nothing in RFRA, moreover, commands states or local governments to zone, regulate, or manage land or other resources in certain ways. And, finally, nothing in RFRA "commandeers" or "hijacks" state or local government processes with respect to regulating the use of property.

To be sure, any governmental action (by any level of government, including the federal government) regarding the definition, use, or regulation of property must be done in accordance with the First Amendment, but that has been required since the enactment of the Constitution and the Bill of Rights.

2. Ensuring Accountability Between Governmental Officials and Citizens.

The Federalism Framework serves as a bulwark against an encroaching federal government intent on accomplishing objectives by turning state and local governments into "field offices"[27] of the national government. ". . . Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal

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[27] "State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes." FERC, 456 U.S. at 777, 102 S.Ct. at 2147 (O'CONNOR, J., BURGER, C.J., REHNQUIST, J., dissenting).

regulatory program.' *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 2366, 69 L.Ed.2d 1 (1981)." *New York*, 505 U.S. at 161, 112 S.Ct at 2420.[28] The danger avoided by ensuring that state and local governments do not become "field offices" of the national government is the danger that accountability between governmental officials and our citizens will be lost. *New York*, 505 U.S. at 168-169, 112 S.Ct. at 2424.

But, again, RFRA commandeers nothing. It only mandates solicitude for our churches and their members' worship by our state and local governments as they undertake action that affects churches and their members. Our state and local governments did not grind to a halt when they had to meet the strict scrutiny test before 1990 and the *Employment Division v. Smith* decision, and there is no reason to believe that they will grind to a halt now because of RFRA.

RFRA does not decree that state and local governments expend funds, political goodwill, or administrative program resources in the pursuit of a federal objective or program. RFRA simply ensures that our citizens right to worship will only be sacrificed for a compelling interest and only if the least restrictive means to achieve that compelling interest are chosen. As stated by Judge Posner in *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996):

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[28] The Court went on to state:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

New York, 505 U.S. at 161; 112 S.Ct. at 2420.

> [RFRA] does not impose substantial direct costs on the states . . . because it makes an exception for regulations that are necessary to the furtherance of compelling state interests. It does not enlist state officials as federal functionaries. It does not make the states dance to a federal tune beyond requiring them to accord a limited measure of protection to religious interests that may not be represented in the politics of the state.

CONCLUSION

In order to protect the property and associated rights of our citizens on one hand and to ensure that any regulation and protection of that property is done in accord with the will of the citizenry, and in order to ensure accountability of governmental officials to the electorate, the Constitution has established a balance by which state and local governments act as barrier against a distant federal government which may inadvertently or purposefully overreach and diminish the rights and powers of citizen. When, however, that federal government "ratchets up" protection for the fundamental rights of our citizens, as Congress did in this case, the concern about an overreaching, distant government dissipates and concerns about appropriate federalism evaporate.

The Court should rule that RFRA does not violate essential notions on tenets of federalism.

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No. 95-2074

FILED

JAN 10 1997

CLERK

IN THE

Supreme Court Of The United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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January 10, 1997

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22pp

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QUESTION PRESENTED

Whether the pre-*Employment Division v. Smith* (*Smith*) free exercise decisions of this Court correctly used the compelling interest test to more clearly reflect the historical origins and intent of the Free Exercise Clause, thus supporting the Religious Freedom Restoration Act's (RFRA's) constitutionality and a reconsideration of *Smith*, and answering the question of whether Congress exceeded its authority under Section 5 of the Fourteenth Amendment of the United States Constitution in the negative.

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BRIEF OF *AMICUS CURIAE*[1]

I. INTRODUCTORY STATEMENT

A key issue which the Petitioner has asked this Court to consider is whether the Religious Freedom Restoration Act (RFRA) provides religious people with more protection than the United States Constitution requires. In order to answer this question, the Court must reconsider its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in light of the history of the Free Exercise Clause and pre-*Smith* precedent.

The Rutherford Institute is a non-profit organization providing legal services in defense of civil and religious liberties. The Institute believes this issue is critical to the fundamental right of the free exercise of religion for all Americans. As *amicus curiae* in this matter, The Rutherford Institute thus urges the Court to take this opportunity to reject its holding in *Smith* that neutral laws of general applicability cannot offend the Free Exercise Clause. In doing so, the Court would restore the compelling interest test for deciding free exercise cases and uphold the constitutionality of the Religious Freedom Restoration Act (RFRA) on the basis of its proper enactment by Congress under Section 5 of the Fourteenth Amendment.

Justice Souter noted in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court's last free exercise decision, that the *Smith* test should be reexamined "in the next case that would turn on its application." 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment). Justice Souter entreated the Court to reexamine *Smith* because the decision was "decidedly untypical" of the Court's

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[1] Counsel of record for all parties have consented to the filing of this brief and, pursuant to Rule 37, letters of consent have been filed with the Clerk.

treatment of formally neutral, generally applicable laws in prior free exercise cases but did not overrule those cases. *Id.* The result was "a free-exercise jurisprudence in tension with itself." *Id.*

Since the *Smith* decision, legal scholars have made important inquiries into the roots of free exercise of religion in this country. Professor Michael W. McConnell's *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) is perhaps the most notable work. Such works were not available to the Court at the time it decided *Smith*,[2] and if they had been, the Court may have found the historical justification for its free exercise precedents persuasive and upheld the compelling state interest test. *See Lukumi*, 508 U.S. at 574-5 (Souter, J., concurring in part and concurring in the judgment). Although this brief will summarize analyses and the many complex arguments in favor of overturning *Smith* found in that scholarship on free exercise history, the Court is commended to the original works cited for the in depth arguments which cannot be recreated in the space permitted here. *Amicus curiae* encourages the Court to re-examine *Smith* now in light of this scholarship and overturn its holding.

The history and original intent of the Free Exercise Clause establish its purpose to protect religious individuals, including the use of exemptions. The compelling interest test analysis effectuates this purpose. This Court's pre-*Smith* opinions thus provide the correct standard for analyzing free exercise cases. As a result, RFRA does not attempt to give more religious protection than the Constitution already provides. Thus, the question of whether Congress exceeded its Section 5 power should be answered in the negative.

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[2] See Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 102 (1990).

II. RECONSIDERATION OF *SMITH* IS SQUARELY WITHIN THE SCOPE OF THIS CASE BECAUSE THE ISSUE OF *SMITH*'S CONTINUED VALIDITY IS ENCOMPASSED BY PETITIONER'S CERTIFIED QUESTION

The second Question Presented in Petitioner's Brief on the Merits calls for a reconsideration of *Smith*:

> 2. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

Brief of Petitioner's, page i.

An essential element of Petitioner's Question is thus, first, whether RFRA provides religious protection "more than the Constitution requires." If this Court's pre-*Smith* decisions provide the correct legal standard for free exercise cases, RFRA is simply a codification of that standard dictated by the Constitution. Only if *Smith* is the proper legal standard does RFRA codify an accommodation of religious practices *greater than* this Court has held the Constitution to require.

Smith did not overturn pre-*Smith* precedents. *Lukumi*, 508 U.S. at 573-4 (Souter, J., concurring in part and concurring in the judgment). Instead, *Smith* re-characterized the holdings of those cases in an effort to harmonize them with its reasoning and rationalize its new standard. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1120-24 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 104-06 (1990). Since the *Smith* rule remains fundamentally at odds with those precedents, a genuine issue exists as to which constitutional rule courts should follow. *Lukumi*, 508 U.S. at 574

(Souter, J., concurring in part and concurring in the judgment). The Court must resolve this issue in order to answer Petitioner's second certified question.

There are other important reasons to reconsider *Smith*. First, the *Smith* rule was established without briefing and oral argument. *Id.* at 571-2. Rarely, if ever, has the Court decided an issue of such magnitude, not presented by the parties or the facts of the case, without notice and argument. *See generally* Laycock, 8 J.L. & Reg. 99. Second, and related to the first reason, *Smith* set forth a broader constitutional rule than was necessary to resolve the case. *Id.* at 572-3. Indeed, Justice O'Connor reached the same result as the majority by applying the existing free exercise precedents. *Id.* Finally, in the course of making its sweeping rule, *Smith* did not inquire into the roots of the free exercise of religion to interpret the original meaning of the Free Exercise Clause. *Id.* at 574-6. Before *Smith*, little information existed on the history of the Free Exercise Clause in either earlier Supreme Court opinions or in scholarly articles. Legal scholarship developed after *Smith* confirms that the pre-*Smith* compelling interest test is consistent with the original understanding that free exercise of religion was to be protected from the burdensome effects of neutral laws of general applicability. That scholarship, some of which is summarized below, must be considered now if *Smith*'s vitality as precedent is to be secure enough to justify considering rejection of RFRA.

In short, the Court must not only reconsider *Smith* as a necessary step to determining RFRA's constitutionality, but also to ensure that free exercise jurisprudence is not left in an unsettled and, to a broad spectrum of society, unsettling condition.

III. THE USE OF THE COMPELLING INTEREST TEST FOR DECIDING FREE EXERCISE CLAUSE CLAIMS, AS CODIFIED BY RFRA, IS CONSISTENT WITH THE HISTORICAL UNDERSTANDING OF THE FREE EXERCISE OF RELIGION

The Court must examine the historical roots of the free exercise of religion in this country in order to understand the original meaning of the Free Exercise Clause. In Religion Clause adjudication, no less than any other area of law, Justice Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and "*as illuminated by history*" is of particular relevance here. *Lynch v. Donnelly*, 465, U.S. 668, 678 (1984); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970). This historical inquiry shows that the long-standing method of exempting religious practices from generally applicable laws as an acceptable means of protecting religious beliefs is more consistent with the Framers' intent than a position of facial neutrality.

Using this approach, after a religious person demonstrates that a law burdens the free exercise of his or her religious beliefs, the government must show that the law serves some compelling state interest and is the least restrictive means for achieving that goal. If the state cannot meet its burden, courts must grant a religious exemption. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403 (1963). This exemption view of the Free Exercise Clause thus protects against unintended burdens on the free exercise of religion unless the state can demonstrate compelling need.

Ultimately, the issue of the nature and role of religion reduces to a question of perspective.[3] The compelling interest

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[3] From the perspective of the State, allowing exemptions is a slippery slope which would result in anarchy. From the religious believer's perspective such fears are baseless because in reality there are few proper

test forces a court to look at the case from both perspectives. First, the court must consider the religious adherent's perspective, and then it must analyze the case from the State's perspective.

Smith, however, advances a competing view. The individual religious adherent's perspective and concerns are irrelevant. According to *Smith*, the Constitution does not require exemptions for generally applicable laws. The protection provided by the Free Exercise Clause, then, is only against blatant attacks on specific religious practices. McConnell, 103 Harv. L. Rev. at 1418. Using this approach, the court asks the question from the State's perspective, is this law specifically directed at religious practices? If not, no protection through exemptions is merited.

Professor McConnell argues that the appropriate analysis of the Free Exercise Clause involves the perspective of both the state and the religious believer. Using this analysis requires the court to study the impact of the law in question on the religious petitioner, often a minority, even if the law makes no obvious reference to religion or has no religious dimension to the state or majority. The pre-*Smith* exemptions view is consistent with this approach and the development of protection from the time of the colonies to the framing of the Free Exercise Clause.

The Framers of the Free Exercise Clause had a long and varied tradition of religious experimentation to draw on as a result of the diversity in the colonies' and newly independent states' approaches to the relationship between Church and State. Although most of the colonies had established religions, the trend toward religious pluralism as an emerging

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laws which would conceivably conflict with the free exercise of religion. The religious perspective supports its position by claiming that proper laws would not conflict and conduct which was disruptive of the peace should be punished.

policy was tangibly rewarded. In those colonies without an established religion, most notably Pennsylvania, religious pluralism flourished and was rewarded with the highest levels of immigration. *Id.* at 1430. The experience of governments which supported a particular religion, on the other hand, show that religious diversity was not a virtue and persecution of religious minorities occurred. In fact, the term "free exercise" was first used in an American legal document when Lord Baltimore required the governor of Maryland to abstain from persecuting Christians in general and Roman Catholics in particular. W. Russell, *The Land of Sanctuary (dd ed. 1908)* at p. 130.

The trend towards greater protection of religion continued throughout other state legal documents. The Rhode Island Charter, for instance, used the term "liberty of conscience" to protect the free exercise of religion. The only restriction on this freedom was that it could not conflict with laws established to keep the peace. McConnell, 103 Harv. L. Rev. at 1426. Similar protection was later enacted in other colonies and were the most common expressions of the freedom in the constitutions of the newly formed states. The free exercise provisions expressly overrode any law contrary to religious exercise; and they limited the free exercise of religion only as necessary for the preservation of the peace as opposed to being subject to the entire body of the law. *Id.* at 1427. It is this tradition of tolerance within limits which is the precursor of the exemption view of the Free Exercise Clause.

The most direct influence on the development of religious tolerance in the constitutions of several of the newly formed states and the federal constitution was the effect of the writings of John Locke and their impact on Thomas Jefferson's Bill for Establishing Religious Freedom. *Id.* at 1430-31. Locke determined that religious intolerance was an indication of poor government and would result in civil disruption because religious diversity could not effectively be contained, and seeking to prevent it would only cause the disruption

which the government sought to avoid. If a free exercise conflict developed, however, Locke believed that the State's view was supreme and the individual could either comply with the law or disobey it according to the dictates of religion and accept the punishment of the State. *Id.* at 1433-34. Locke's view is consistent with the no-exemption policy of *Smith*. The development of religious freedom, however, did not stop with Locke.

Immediately after the American Revolution, the prevailing view was that State sponsorship of religion was inimical to the vitality of religion and would improperly subject it to State control. *Id.* at 1438-39. The role of the State under this view was that it should provide protection and non-interference with the practice of religion. In return, religious groups would inculcate their members with religious faith and, as a by-product, with virtue or public morality. This view prevailed over the old model under which the State supported religion to derive the benefit of public morality. *Id.* at 1441-43. In light of this new view, Locke's view of religious tolerance was deemed insufficiently protective of the free exercise of religion.

Additionally, the advent of judicial review and its protection of individual rights as a check on the power of the State led to further expansion of the doctrine of free exercise of religion. As a result of the constitutional grant of the responsibility to the courts to enforce the boundary between the power of the State and the rights of the individual, the court was empowered and obligated to determine what religious freedom requires and to protect it through the use of exemptions. *Id.* at 1445.

Thomas Jefferson's view of the role of religion, although similar to Locke's, represents an expansion of freedom of religion. Jefferson believed the role of the State was to act to prevent injury to others, or in other words, secure the peace. Toward this end, he believed that religious opinion or belief was not properly the subject of governmental action. This

belief extended to his rejection of State funded or sponsored religion. On the other hand, he believed that actions or conduct were the province of the State, and therefore, violations of the law should be prosecuted. *Id.* at 1451. Further expanding the view of religious free exercise, James Madison advocated a system in which the demands of religion would take precedence over the secular law in those matters concerning religion. *Id.* at 1453.

Most state constitutions comported with Madison's views on giving precedence to the individual's religious duties over the power of the State, and specifically included protection for the free exercise of religious beliefs. These free exercise provisions were stated affirmatively unlike the Jeffersonian view which, like that of Locke, merely tolerated religion. Professor McConnell relies on the religious freedom protections found in the various state constitutions as support for his interpretation of the federal constitution on the grounds that they are:

> the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term "free exercise of religion" meant what it had meant in their states. The wording of the state provisions thus casts light on the meaning of the first amendment.
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> *Id.* at 1456.

Although all of these provisions protected the free exercise of religion, there were differences in the scope of the protection. The more expansive statement applied to all actions with a religious motive, with the limitation of preserving the peace and safety of the remainder of the community. The other constitutions protected religious conduct only in the context of "worship." The term "worship" was used to limit the freedom to the rituals of religion. Professor McConnell concludes that the fact that the federal constitution used the

more expansive expression of the freedom was deliberate in light of the numerous examples of a narrower expression of the freedom. *Id.* at 1460. As a further indication of the direction of thought on the issue, he points out that subsequent state constitutions followed the more expansive definition. *Id.* at 1461.

Under these state constitutions, then, free exercise was generally limited only to prevent disturbances of the peace and safety of the remainder of the community. *Id.* at 1462. The presumption, therefore, was that the right of free exercise prevails in every instance except where the religious act violates a peace and safety regulation or when the religious act would trespass on the private rights of another. Thus, this approach valued freedom of religion and the perspective of the individual above a state's interest in areas not affecting the peace or public safety.

An examination of controversies prior to the passage of the United States' Free Exercise Clause supports the conclusion that the right of free exercise was intended to be an affirmative statement which permitted exemptions from generally applicable laws for religious acts, subject to the limitation that the religious acts not violate laws preserving peace, safety and the private rights of others. *Id.* at 1466. *But see*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). The issue of exemption arose only rarely in the largely homogeneous Protestant colonies. When it did arise, it usually involved oath requirements, military conscription or religious assessments. *Id.* Most often, an exception was created to the requirement to accommodate the religious conviction. *Id.* at 1467.

Another controversy supporting the exemption view arose because the federal Constitution did not contain general protections for religion. One argument stated that as the federal government is one of enumerated powers only, the absence of any power to create laws affecting religion provides

protection for religion. This argument was rejected by supporters of a free exercise amendment on the grounds that the many enumerated powers were more than sufficient to burden the exercise of religion.

The second argument asserted that the newly created system of checks and balances in conjunction with the existing religious pluralism would assure that no single group could gain sufficient power to enable it to oppress or frustrate the religious preferences of any other group. This argument was rejected on the grounds that, although it was adequate as far as it went, it did not provide sufficient protection against unwitting oppression of minority groups. The proponents of a free exercise amendment worried that minority groups with sufficient influence at the state level would not have equivalent influence at the national level and could be subjected to laws of general application which would tend to oppress religion. *Id.* at 1479-80. Therefore, the passage of the Free Exercise Clause itself lends further support to the idea that the Founders intended to provide exemptions as a means of protecting minority religions from laws of general application.

After debate, the final version of the amendment protected the free exercise of religion. Professor McConnell provides a detailed explanation of the development of the final version and possible reasons for differentiation in word choice. He concludes that the decision to use the word "religion" alone, instead of, or in conjunction with, the phrase "rights of conscience" was to provide a broad protection to organized religion. *Id.* at 1488-94.

The use of the word "religion" instead of "rights of conscience" is significant because it recognized that when religious convictions differed from the secular law, the individual was torn between two sovereigns, the State and God. This type of conflict was seen as materially different from a situation where an individual's moral judgment conflicted with a law. This was a difference in kind which was deemed worthy of special protection. Providing specific protection for relig-

ious differences was entirely consistent with the world view of the drafters. The Drafters believed that religious beliefs merited special protection, not because those beliefs were qualitatively superior to non-religious judgments, but because of the conflict between dual sovereigns, both of whom demanded obedience that was beyond the individual's control to harmonize. *Id.* at 1496-97.

It follows, then, that the *Sherbert* rule and its progeny allowing exemptions are more consistent with the understanding of the drafters of the First Amendment. *See Lukumi*, 508 U.S. 574-6 (Souter, J., concurring in part and concurring in the judgment). The history and original intent of the Free Exercise Clause support protection of religious individuals through providing exemptions, not merely prohibiting anti-religious discrimination. *Id.* at 1512. The compelling interest test is tailored to protect individual rights and to allow for exemptions when government has not used the least restrictive means in achieving its interest. The history and practice of allowing exemptions, the intent of the Founders, the state constitutions and the pre-Free Exercise Clause controversies all support the practice of allowing exemptions from generally applicable laws. *Id.* at 1511. RFRA's use of the compelling interest test, therefore, merely encapsulates the purpose of the Free Exercise Clause and does not add to the Constitution. As such, the question of whether Congress exceeded its Section 5 power should be answered in the negative.

IV. THE PRE-*SMITH* DECISIONS OF THIS COURT IN FREE EXERCISE CASES EMBODY THE HISTORICAL UNDERSTANDING THAT RELIGIOUS PRACTICES ARE PROTECTED FROM THE BURDENSOME EFFECTS OF NEUTRAL LAWS OF GENERAL APPLICABILITY

Prior to *Smith*, the Court's decisions in free exercise cases consistently embodied the concept that the Free Exercise Clause required not only formal neutrality, which would

prohibit only those laws whose object is to discriminate against religion, but also substantive neutrality, which would additionally require exempting religious practices from formally neutral laws. *Lukumi*, 508 U.S. at 562-6 (Souter, J., concurring in part and concurring in the judgment). The articulated rule applied in each of those cases was that a compelling government interest must be demonstrated to justify any substantial burden placed by the government on religious practice. There is no doubt that the Court applied heightened scrutiny in those cases. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Bob Jones University v. United States* 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Yoder v. Wisconsin*, 406 U.S. 205, 215-29 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940). *See also Lukumi*, 508 U.S. at 565-6 (Souter, J., concurring in part and concurring in the judgment).

In none of those cases did the Court inquire into the original meaning of the Free Exercise Clause in developing and applying the compelling interest test (nor did it in *Smith*), *Lukumi*, 508 U.S. at 574-5 (Souter, J., concurring in part and concurring in the judgment). Yet, that test emerged from the Court's natural reading of the Free Exercise Clause as a restriction on government's power to burden religious practices, whether by a law's object or by its unintended effect.

Such a reading is consistent with the Court's treatment of other First Amendment rights, frequently affording them exceptions from neutral, generally applicable laws. Laycock, 8 J.L. & Relig. at 103-04 (citing *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 445 (1958)(political parties and move-

ments exempted from facially neutral disclosure laws); *Hustler v. Falwell*, 458 U.S. 46 (1988)(creating special defenses for media against facially neutral tort law).

It is apparent from a review of Section III above that the historical origins of the Free Exercise Clause provide considerable support for the compelling interest test which the Court derived from a plain reading of the text. It certainly undermines the remark in *Smith* that the compelling interest test "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. Rather, it reveals how fully pre-*Smith* cases embodied the understanding of the Framers of the Free Exercise Clause, and how far *Smith*'s rule diverges from it.

Smith is inconsistent with free exercise precedent, which dates from *Sherbert*. Instead of adhering to this precedent, the Court relied primarily on cases which have been overruled or were minority positions. For instance, the Court relied on and quoted extensively from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), without mentioning that this case was essentially overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith*, 494 U.S. at 879. The Court also quoted from the three-justice plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), even though that opinion was not followed by five other Justices in separate opinions. *Smith*, 494 U.S. at 883. *Bowen* was later expressly rejected in *Hobbie*, 480 U.S. 141 (1987). The Court also cited an older case, *Reynolds v. United States*, 98 U.S. 145 (1879), which upheld a law prohibiting polygamy, practiced then by Mormons, but did so on the reasoning that the Free Exercise Clause protects only beliefs, not conduct. *Id.* at 166-67. But the Court later retreated from that position in *Cantwell*, 310 U.S. at 303-04. Even so, the Court has read *Reynolds*'s elaboration of the evils of polygamy as standing for the compelling interest test. *See, e.g., Sherbert*, 374 U.S. at 403.

In sum, these cases and their subsequent treatment by the Court validate the Court's continued endorsement of the compelling interest test, rather than support *Smith*'s rejection of it.

Lukumi, 508 U.S. at 569-70 (Souter, J., concurring in part and concurring in the judgment).

Smith's treatment of *Cantwell* and *Yoder*, two cases which unquestionably required exemption of religious practices from neutral laws of general applicability, is also problematic. Rather than apply those cases as pure free exercise precedents, *Smith* instead re-characterizes them as "hybrids," involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881-82. This hybrid distinction, however, is not supported by the text, nor the history of the Free Exercise Clause. Even so, religious freedom was the fundamental issue in both cases, as each was explicit in stating. *Cantwell*, 310 U.S. at 303-07; *Yoder*, 406 U.S. at 201. *Smith*'s attempt, then, at distinguishing *Cantwell* and *Yoder* as "hybrid" cases has instead shown them to be sound free exercise precedent.

Finally, *Smith* tries to reconcile its conclusion with the unemployment compensation cases involving free exercise. *Frazee*, 489 U.S. 829 (1989); *Hobbie*, 480 U.S. 136 (1987); *Thomas*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court noted that these were the only free exercise cases in which the compelling interest test had been used to invalidate a government action, and had only done so because they involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," *Smith*, 494 U.S. at 883-4, and as such "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

But as Professor McConnell has observed:

> Difficulty of administration can fairly constitute at least part of the government interest in enforcing the

> law without exceptions but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation - indeed to the full universe of claims governed by the due process requirement of "some kind of hearing."
>
> McConnell, 57 U. Chi. L. Rev. at 1123.

Moreover, *Smith*'s distinction of these cases is one without a difference, because most free exercise cases "resemble the unemployment compensation cases in that they involve individualized governmental assessments of the claimant's circumstances." *Id.* (citing *United States v. Lee*, 455 U.S. 252 (1982); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) as examples of non-unemployment compensation cases that involved such individualized governmental assessments without the application of the compelling interest test).

Smith, therefore, is unconvincing in its effort to achieve its result without overturning any precedent, by relying on cases of dubious application (*Gobitis, Bowen* and *Reynolds*), and by distinguishing established free exercise precedent as either not primarily about free exercise (*Cantwell* and *Yoder*) or as *sui generis* (the unemployment compensation cases).

In fact, these free exercise cases all demonstrate that the compelling interest test was a natural outgrowth of the Court's plain reading of the Free Exercise Clause as requiring exemption from neutral, generally applicable laws - a reading which now acquires added texture from the recent legal scholarship on the historical context of the Free Exercise Clause.

CONCLUSION

The Court should uphold RFRA's constitutionality by reconsidering and rejecting its holding in *Smith* in light of post-*Smith* legal scholarship, which casts serious doubt on *Smith*'s consistency with the original understanding of the Free Exercise Clause and which substantiates the consistency of the compelling interest test with that same understanding.

Respectfully submitted,

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January 10, 1997

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No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F.FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Commonwealth of Virginia and its citizens have been deeply committed to religious freedom since the beginning days of the Republic. It was here that Thomas Jefferson authored the Virginia Statute of Religious Freedom which later served as a model for the First Amendment to the U.S. Constitution. And Virginians James Madison and Thomas Jefferson played leading roles in the drafting and adoption of the First Amendment which preserved the freedom of religious exercise for the entire nation.[1]

Indeed, so ardent is the Commonwealth's concern for religious freedom that it filed an amicus brief in opposition to the policies of its own public university in *Rosenberger v. The Rector and Visitors of the University of Virginia*, a case in which this Court struck down the University's practice of discriminating against Christian students in its student fee allocations. 115 S. Ct. 2510 (1995).

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[1] "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947).

The Commonwealth further is concerned that the parties' briefs may not have presented the full range of legal alternatives the Court has available to resolve the current dispute, as well as to resolve the on-going debate over the Religious Freedom Restoration Act's ("RFRA" or "Act") constitutionality and its practical implications for state governments. The Commonwealth believes that the best alternative the Court has is simply to reverse its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). By reversing *Smith*, the Court could resurrect the First Amendment's protection for religious freedom sought by the Archbishop of San Antonio and other people of faith while avoiding the problematic constitutional and practical concerns many states have voiced about RFRA.

The Commonwealth of Virginia agrees with the many legal scholars and religious organizations who responded to *Smith* that its reasoning was wrong and must be reversed. Religious organizations as diverse as the American Baptist Churches, the American Jewish Congress, the Presbyterian Church, the National Council of Jewish Women, the Church of Jesus Christ of Latter-

day Saints and the North American Council for Muslim Women have advocated the kind of heightened constitutional protection for religious freedom which the Commonwealth proposes here.[2] Thus the Commonwealth of Virginia submits this brief in the interest of expressing its full support for the protection of its citizens' religious freedoms against intrusive government interference, and in proposing the most jurisprudentially sound manner of doing so.

SUMMARY OF ARGUMENT

In *Employment Division v. Smith*, this Court held that facially neutral laws which have incidental effects on the exercise of religion do not violate the First Amendment if the government can demonstrate a rational basis for the law. 494 U.S. at 888-89. Prior to *Smith*, government could justify restrictions upon the exercise of religion only by meeting the most exacting scrutiny,

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[2]For a list of several religious organizations which advocate heightened constitutional scrutiny for religious freedom, *see* 139 Cong. Rec. S14350, S14362 (remarks of Senator Hatch). For a list of legal scholars, *see* James E. Ryan, *Smith and The Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1409-10 and n.15 (1992).

which required the government to demonstrate that its restriction served a compelling interest and adopted the most narrowly tailored means of achieving that interest. *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Thus, *Smith* relaxed the burden imposed upon government to justify restrictions upon religious freedom and paved the way for intrusive government regulation of religious exercise.

In an effort to resurrect the pre-*Smith* compelling interest test, Congress enacted the Religious Freedom Restoration Act in 1993. 42 U.S.C. § 2000bb *et seq*. The Act provides that government may not impose a restriction upon religious exercise unless the government demonstrates that the restriction "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Act codifies the pre-*Smith* compelling interest test for all laws of general application:

> The purposes of this Act are to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide

> a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

Congress's passage of RFRA raised several constitutional questions of the kind raised here by the City of Boerne, Texas, such as whether Congress exceeded its authority under the Fourteenth Amendment (a federalism concern) and whether Congress encroached upon the role of the judiciary (a separation of powers concern). These questions have been litigated in numerous cases since RFRA was enacted with varying results.

It is the position of the Commonwealth of Virginia that RFRA is well-intentioned and that the compelling interest test it codifies is the proper level of scrutiny for most spheres of government regulation of religious exercise. However, the Commonwealth believes that the First Amendment constitutionally compels that level of scrutiny in any event and that *Smith* was wrongly decided. The problem is not RFRA, but the *Smith* opinion it attempts to undo.[3] Therefore, the Court should

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[3] "[T]he two key assumptions of the RFRA are that *Smith* was wrongly decided as a matter of constitutional law — indeed, obviously and tragically wrong might be a more apropos description — and that a legislative reassertion

overturn *Smith* for the reasons stated below and reaffirm the Constitution's protection for religious freedom against intrusive government regulation, thus obviating the need for resort to a legislatively-enacted protection subject to repeal by some future Congress.

ARGUMENT

A.

Smith Was Wrongly Decided And Should Be Overturned.

In *Smith* this Court held, by a 5-4 vote (Justice O'Connor concurring on different grounds), that government need show only a rational basis to justify a law of general applicability which restricts religious exercise. The Court reasoned that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his

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of past doctrine and the accompanying doctrinal tests will provide a proper and effective cure for the Court's flawed interpretation of the Constitution." Allan Ides, *The Text of the Free Exercise Clause As A Measure of Employment Division v. Smith and the Religious Freedom Restoration Act*, 51 Wash & Lee L. Rev. 135, 137 (1994).

religion prescribes (or proscribes).'" 494 U.S. 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)). By so holding, the Court abandoned the compelling interest test for governmental restrictions on religious exercise. *Id.* at 888. The Supreme Court should reverse *Smith* and resurrect the compelling interest test for several reasons.

First, *Smith* too narrowly construed the protection afforded by the First Amendment for religious exercise. *Smith* reasoned that the First Amendment's compelling interest standard applies only to government restrictions specifically targeting religious exercise, not to government restrictions of general applicability which incidentally impact religious exercise. That interpretation is too narrow because a facially neutral law can just as severely, if not more severely, restrict one's exercise of religion as a law specifically targeted at religion. In both circumstances, a person's freedom to exercise religion should be the Constitution's and this Court's paramount concern.

Second, *Smith* reasoned that application of a compelling interest test to laws of general applicability would create a

universal exception for persons of faith from compliance with the law. The Court criticized that result:

> [W]hat [strict scrutiny] would produce here — a private right to ignore generally applicable laws — is a constitutional anomaly.

494 U.S. at 886.

The so-called "constitutional anomaly" is precisely that: constitutional. Such a right of religious exercise is expressly provided by the First Amendment and is wholly consistent with the precious and delicate freedom at stake. It is precisely because of the importance of free religious exercise, a right so precious that our forefathers braved the Atlantic and settled in a wilderness to obtain it, that the First Amendment granted special protection for that sphere of human activity.

Of course, there is substantial merit to the argument that an exception for sincere religious exercise is not anomalous at all. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1137-1138 (1990).

Third, *Smith's* reasoning that strict scrutiny would visit what the Court termed "a parade of horribles" upon a wide range

of facially neutral laws is exaggerated. As one scholar has demonstrated, even under the compelling interest test applied prior to *Smith*, many government restrictions survived legal challenge. *See* James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, Appendices A & B (1992) (showing that the vast majority of statutes challenged have been upheld).[4]

The many cases sustaining government action prior to *Smith* demonstrate that not only is *Smith's* "parade of horribles" hyperbole, but it misses a critical point. As a matter of constitutional jurisprudence, it is the heightened protection for religious freedom which matters *most* to the community of faith, not necessarily the results of each individual challenge. The compelling interest test guarantees that when one's religious exercise is impinged, a court will apply the strictest level of legal scrutiny available under the Constitution. The compelling interest

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[4]Indeed, one would have expected the Oregon criminal law prohibiting drug use, which was at issue in *Smith*, to be upheld in light of the state's compelling interest in criminal law enforcement. *See Smith*, 494 U.S. at 903-906 (O'Connor, J., concurring).

test does not guarantee victory for all claims and certainly not for claims that are obviously frivolous or insincere.

The Court should resurrect the compelling interest test for free exercise claims for this reason alone. As free exercise scholar Michael W. McConnell wisely has observed:

> If the Court wishes to consider a parade of horribles, it should parade the horribles on both sides. But while the two parades may be of the same length, they are of very different quality. The judicial system is able to reject claims that would be horrible if granted; believers are helpless to deal with infringements on religious freedom that the courts refuse to remedy.

Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1143 (1990).

Smith's closely connected preoccupation with the possibility of "anarchy" by creating for people of faith "a private right to ignore generally applicable laws" is misplaced. 494 U.S. at 886 and 888. Certainly the Court did not mean to suggest that an exception for people of faith from government restriction, which is specifically granted by the First Amendment, and which must be adjudicated by a court before the restriction is lifted, results in civil "anarchy." The Bill of Rights creates many

exceptions to otherwise neutral government restrictions, many of which are protected by the compelling interest test, without "anarchy."

In sum, the Supreme Court should re-establish the First Amendment's paramount protection for the religious freedom of all people of faith, and require government to demonstrate a compelling interest and narrow tailoring before it restricts that precious freedom.

B.

If *Smith* Is Overturned, RFRA Will Simply Codify Constitutional Law.

On its face, RFRA purports to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Therefore, if the Court overturns *Smith*, RFRA will simply codify constitutional law.

Since RFRA would merely codify existing constitutional law, the constitutional challenges pressed against it here would be

moot and the Court could decide the merits of the Archbishop of San Antonio's free exercise claim according to the constitutionally mandated compelling interest test without resort to RFRA.

C.

To The Extent RFRA Imposes A More Stringent Standard Than The Pre-*Smith* Constitutional Case Law For Prisoner Cases, This Court Need Not Reach That Issue In This Case Concerning A Zoning Restriction.

RFRA purports to establish a higher level of scrutiny for prison restrictions on the free exercise claims of prisoners than that established in pre-*Smith* jurisprudence. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (adopting the less stringent rational basis standard for free exercise claims in the prison context).

Admittedly, this Court's reversal of *Smith* will not resolve the constitutional questions which linger about Congress's authority to impose a stricter standard of review for prisoner cases than the Supreme Court has held the First Amendment requires. However, the case at bar is not a prisoner case, it is a zoning case, and the Court need not decide whether RFRA's provisions

for prisons are constitutional here. The plain and simple result of overturning *Smith* in this case will be the resurrection of the compelling interest test for the Archbishop of San Antonio's challenge to the City of Boerne's zoning restriction. Once that step is taken, the Court can simply decide whether the zoning restriction survives strict scrutiny under *Yoder* and its progeny.

CONCLUSION

It is with deep respect for the importance of faith in our society that the Commonwealth of Virginia urges the Court to re-analyze its reasoning in *Employment Division v. Smith* and to conclude that government regulation of religious exercise should be scrutinized as carefully as possible. Only strict scrutiny compelled by the First Amendment of the Constitution can adequately protect religious freedom, and the Constitution should be the sole source of legal protection that a person of faith should need to invoke against government impairment of that precious freedom. Therefore, the Commonwealth of Virginia urges the

Court to reverse its decision in *Smith* and reaffirm heightened constitutional protection for religious freedom.

Respectfully submitted,

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January 10, 1997

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No. 95-2074

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF INTEREST

The Coalition for the Free Exercise of Religion ("Coalition") is a group of over sixty religious and civil liberties organizations. The religious organizations in the Coalition represent the spectrum of religious diversity in America – Christians, Jews, Moslems, Native Americans, and Sikhs. The beliefs and practices of the religious communities in the Coalition are as diverse as the population of the Nation. The Coalition includes liberals and conservatives, and groups with world views as disparate as People for the American Way and Traditional Values Coalition. We disagree profoundly with one another about many of our most cherished traditions and beliefs. But one of the things that unifies all of us even more profoundly is our commitment to the protection of religious freedom as the first of our civil liberties.[1] We are united by the conviction that the protection of religious freedom is essential for the well-being of American society. The members of the Coalition participating in this brief are listed in Appendix A.

After this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Coalition sought from Congress remedial legislation that would secure religious freedom more adequately than under the standard

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[1] For an elegant statement of the primacy of the Religion Clauses of the First Amendment in our constitutional values, *see The Williamsburg Charter*, 8 J. LAW & RELIG. 5-22 (1990); for a study of the fragility of this constitutional value, *see* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

announced in *Smith*. We vigorously advocated the passage of the Religious Freedom Restoration Act ("RFRA"), and we act now in unison with the United States to support the constitutionality of RFRA whenever it is challenged by state and local authorities. The Coalition takes no position whatever on the merits or on any disputes between or among the parties. This brief addresses only the question whether RFRA is a legitimate exercise of congressional power.

The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

ARGUMENT

I. Religious Communities Cannot Maintain their Beliefs and Practices Free from Governmental Interference as Long as the Religious Freedom Restoration Act Remains Under a Constitutional Cloud.

This case comes to this Court in an unusual posture. Both petitioner and respondent urge the Court to grant certiorari, notwithstanding the fact the respondent prevailed in the court of appeals. By the same token, the Coalition fully supports the decision of the court of appeals, but also urges that the Court take this case. A prompt decision by this Court on the constitutionality of RFRA is crucial to protecting the religious freedom of all Americans and is fully warranted under the Court's standards for reviewing the constitutionality of acts of Congress.

On the day the Court decided to alter its free exercise jurisprudence in *Employment Division v. Smith*, 494 U.S. 872 (1990), it was immediately apparent to the members of this Coalition that we need greater protection for religious freedom than is provided by the rational basis standard announced by the Court in *Smith*. For one thing, *Smith* escalated the level of proof that we would have to demonstrate before receiving meaningful judicial protection from oppressive governmental regulation. Before *Smith* the government was required to demonstrate that its interest in a case involving deeply held religious beliefs and practices was truly compelling. As the Court announced in *Sherbert v. Verner*, 374 U.S. 398 (1963): "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious claimants], endangering paramount interests, give occasion for permissible limitation [on the free exercise of religion].'" 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). After *Smith* and before RFRA, religious claimants were required to demonstrate intentional or purposeful discrimination against a religious body before they could avail themselves of the compelling interest standard.

We appreciate the value of neutrality that the Court announced as central to free exercise jurisprudence in *Smith*; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But whether subtle or overt, inadvertent or intentional, violations of free exercise of religion can be masked under the category of facially neutral, generally applicable norms about public

health, welfare, or safety. For example, the general rule about availability of evidence in a criminal prosecution can be stated in a facially neutral way: the government is entitled to relevant and probative evidence. But since the earliest days of the Republic this broad rule has – for profound reasons of constitutional dimensions – admitted of a very important exception that protects against the use of the clergy as agents of the government. *See, e.g., Trammell v. United States*, 445 U.S. 40, 51 (1980) (dictum); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*, 103 Harv. L. Rev. 1409, 1410-12 (1990); Michael Plantamura, "Clergyman-Penitent Privilege," in Scott Stone and Ronald Liebman eds., *Testimonial Privileges* 359-76 (1983); James A. Serritella, "Confidentiality, the Church, and the Clergy," *Proceedings of the Forty-Eighth Annual Convention of the Canon Law Society of America* 83-93 (1986); and John C. Bush and William Harold Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law* (3d ed. 1989). Rejecting this long-standing and virtually universal practice of the states, the District Attorney of Lane County, Oregon – a jurisdiction that does not currently have a statute expressly protecting the confidentiality of communications between clergy and penitents – recently ordered the surreptitious recording of a sacramental confession by a penitent to a priest while the penitent was in custody. After vigorous protest by church leaders and civil libertarians, the prosecutor announced that he would not use the tape in court and that he would support legislation prohibiting the use of such evidence in his state. "Apology For Taping Inmate's Talk," *New York Times*, A-16, May 24, 1996. In the Oregon case the government yielded to

political pressure, but more frequently religious groups have little or no influence over elected officials accustomed to granting no exceptions to the uniform enforcement of the law.[2] Without RFRA, ancient religious practices long revered in this country can easily be eroded under the rubric of a generally applicable, facially neutral rule; and the level of generality of the governmental interest can easily be manipulated by an attorney for the government. The statutory safeguard afforded by RFRA is necessary, then, to avoid outrageous violations of free exercise such as that contemplated by the District Attorney in Oregon.

We struggle with the issue of the constitutionality of RFRA continuously. Because attorneys for state and local governments have subjected RFRA to relentless attack, we must litigate the constitutionality of this act of Congress over and over again. Every time we advise a client, whether a church or an individual believer, prudence dictates that we warn the client that the government may claim that RFRA is unconstitutional and that this claim has not yet been definitively resolved. The cloud that continues to hover over the constitutionality of RFRA thus impedes the effectiveness of an act of Congress that

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[2] The City of Boerne did not try to accommodate the religious needs of the Roman Catholic parishioners here, but forced Archbishop Flores into court to seek a judgment enforcing rights secured under RFRA. This governmental refusal to accommodate religious interests is reflected by governmental units in most of the cases litigated under RFRA, as well as in countless unreported cases in which members of the Coalition have given counsel to believers and their communities.

is entitled to a presumption of constitutionality, *United States v. National Dairy Products*, 372 U.S. 29, 32 (1963). Unless this cloud of unconstitutionality is removed from RFRA, the statute will not have the full operational effect designed by Congress, for the lower courts will follow the doctrine of *Ashwander v. TVA*, 297 U.S. 288 (1936) (to avoid a holding of unconstitutionality, an act of Congress may be construed narrowly), and will continue to produce cases such as *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 913 P. 2d 909 (1996), cert. pending, No. 96-31, and *Swanner v. Anchorage Equal Rights Commission*, 874 P. 2d 274 (Alaska 1994), cert. denied, 115 S. Ct. 460 (1995), where the statute has been mangled into unrecognizable forms.[3] Only this Court can resolve the lingering doubt about the constitutionality of RFRA and enable its full implementation to proceed. For these reasons we urge the Court to take this case and to sustain RFRA.

Both in our legislative efforts and in our current posture of litigation, we have remained united in a strong coalition to protect religious freedom. Our solidarity on

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[3] In *Smith v. Fair Employment and Housing Commission*, the California Supreme Court did not invalidate RFRA. Only one Justice was of that view, *Smith*, 12 Cal. 4th at 1189 (Mosk, J., concurring). Similarly, in *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court did not invalidate RFRA. But in both cases, the lower courts trivialized the religious interest and dramatically escalated the statutory threshold requirement of a showing of "burden" that a religious claimant must make in a RFRA case. *Smith*, 12 Cal. 4th at 1176; *Swanner*, 874 P. 2d at 283. For an extensive discussion of burden analysis in RFRA cases, *see Mack v. O'Leary*, 80 F. 3d 1175 (7th Cir. 1996).

this issue is firm because it is our collective experience that our religious beliefs and practices are increasingly vulnerable to the insensitivity of governmental bodies who insist upon the application of burdensome governmental regulations to religious organizations, without regard for the fundamental significance of religious freedom in our constitutional order. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

In this environment, all religious communities suffer equally. In our national imagery the bell is typically a symbol of human freedom. It rings to proclaim justice in the land. But it can also toll slowly to signalize communal grief at a loss or a death. As John Donne taught us centuries ago, "Ask not for whom the bell tolls; it tolls for thee."

When a religious belief is stifled by bureaucracy, that is a kind of dying that affects us all. When, as here, a Roman Catholic Archbishop is told by a municipality that he and his community may not build a church sufficiently large to afford his fellow Catholics an opportunity to worship as the canons of their church require, that is a kind of dying that causes concern and even grief for us all. And when a federal district court tells this Archbishop that Congress and the Chief Executive exceeded their constitutional authority when they enacted RFRA, that too is a death knell for religious freedom. By contrast, when the court of appeals reverses that district court and sustains RFRA, the bell of freedom peals crisply for all of us, who are free to worship God according to the dictates of conscience. What troubles us most in this long interim between the enactment of RFRA and the present moment is the uncertainty about the ringing of

the bell. We know the difference between peals of joy and a death knell, and we never know whether a court is going to order the one or the other. Respondent Flores notes that no appellate court has yet invalidated RFRA, but lower courts have frequently held that RFRA is constitutionally infirm. In this atmosphere of uncertainty, the time is ripe for this Court to resolve this issue definitively.

As suggested both by the facts in this record and by the story referred to above about the intention of a prosecutor to use a sacramental confession in a homicide case, the kinds of harms we have experienced in this period after the enactment of RFRA go to the very heart and soul of our identity and mission as religious communities. Nothing symbolizes the current state of hostility toward religious communities more virulently than the rash of burnings of churches, principally of African-Americans, that has recently scarred our nation's history. Along with right-thinking persons of all faiths and of no religious faith, the Coalition emphatically rejects this violence. Although we acknowledge that this case is in no way causally related to these church bombings, the sad effect of both the bombings and the application of historical preservation ordinances to churches is the same, to deprive the faithful of a house of prayer according to the dictates of conscience. There can be no violation of free exercise of religion more obvious than governmental interference with the ability of a religious community to worship in the manner that God has enjoined. As such, this case serves as an excellent vehicle for this Court to signal its own concern for the independence of religious communities from stifling governmental control.

II. This Court Has Acted Promptly in the Past to Resolve any Doubt about the Authority of Congress to Protect Important Civil Rights, and the Court Should Take this Case to Clarify that the Religious Freedom Restoration Act is a Valid Exercise of Congressional Power to Secure the First of our Civil Liberties, Religious Freedom.

One of the prudential rules that guide the discretion of the Court as it shapes its docket is to wait for a clear conflict in authority among the courts of appeals, or between a federal court of appeals and the highest tribunal of one of the several states. Rule 10, Rules of the Supreme Court of the United States. This rule is not, however, inflexible. Respondent Flores has noted in his statement in response to the Petition for certiorari that the Court frequently reviews the constitutionality of federal statutes without waiting for a split in circuit authority. Statement of Flores at 5-6.

The Coalition notes that the Court has acted promptly to dispel doubts about important civil rights legislation in the past. For example, the Court acted with remarkable speed to sustain the Civil Rights Act of 1964 against constitutional challenges. Perhaps the most significant federal statute of this century, this legislation was not enacted swiftly or without struggle. On the contrary, the opponents of this legislation conducted the longest filibuster in the history of the United States Senate, lasting 82 working days and comprising over ten million words spread out on over 63,000 pages of the *Congressional Record*. On June 17, the Senate voted 76-18 to close off further debate. Two days later the Senate voted 73-27

to pass a compromise version of the bill that had bipartisan support from the Majority Leader and the Minority Leader. When the bill returned to the House, many members of the House were dissatisfied with the Senate version of this landmark legislation, which they viewed as weaker on key provisions. To avoid any further delay that would come from attempting to reconcile the House version and the Senate version in a conference committee, however, the House approved the Senate version of the bill on July 2, 1964. On the same day President Lyndon Johnson signed the bill into law. Pub. L. 88-352, 78 Stat. 241.

Legislative conflict and delay were met with judicial unanimity and expedition in this Court. Within days, a motel in Atlanta, Georgia, challenged the constitutionality of Title II of the new act, prohibiting racial discrimination in public accommodations. Acting Attorney General Katzenbach immediately filed a counterclaim, seeking an injunction against future violations of the act by the plaintiff. The three-judge district court empaneled to hear the constitutional challenge to the act promptly held a hearing on the requests for injunctive relief. On July 22, less than three weeks after the enactment of the legislation, the district court sustained the act, issued a permanent injunction against the motel to commence on August 11, and refused to stay the injunction. *Heart of Atlanta Motel v. United States*, 231 F. Supp. 393 (N.D. Ga. 1964).

On August 10, Justice Black, acting in his capacity as Circuit Justice, denied an application from the motel and an adjacent restaurant operated by Lester Maddox for a stay of the injunction, on the view that "a temporary

injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect." Justice Black also noted that "the constitutionally chosen policies of the Act challenged in these cases are not the result of sudden, impulsive legislative action, but represent the culmination of one of the most thorough debates in the history of Congress." And he agreed with the appellants and with the Solicitor General "as to the wisdom of having the specific constitutional issues here involved decided at as early a date as orderly procedure will permit." *Heart of Atlanta Motel v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., Circuit Justice).

On the first Monday of its October Term, the Court not only noted probable jurisdiction in the case, but also granted a joint motion for acceleration of oral argument and heard the case on the very same day. *Heart of Atlanta Motel v. United States*, 379 U.S. 803 (1964). On December 14, barely five months after the legislation had been enacted, the Court issued an unanimous opinion sustaining the Civil Rights Act of 1964. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

There are important differences between RFRA and Title II of the Civil Rights Act. The one protects the free exercise of religion against excessive regulation by the government; the other is aimed at the evil of discrimination on the basis of race, color, religion, or national origin, principally by private parties. But these differences are not as important as the profound similarities between these two acts of Congress. Both are instances of landmark legislation in which Congress acted affirmatively and by an overwhelming bipartisan majority to create a

statutory remedy directly aimed at securing civil liberties and civil rights more adequately than under a leading precedent of this Court, whether *Smith* or the infamous *Civil Rights Cases*, 109 U.S. 3 (1883).

We know that we will not prevail in every skirmish with state and local government over the application of RFRA to our various beliefs and practices, any more than the NAACP Legal Defense Fund is guaranteed victory in all of the litigation it has brought under federal civil rights statutes. But we urge the Court to affirm the crucial protection that religious believers and their communities now enjoy under RFRA.

We note that the rule announced in *Smith* commanded only a bare majority of the Court. *See, e.g., Smith*, 494 U.S. at 890 (O'Connor, J., concurring in the judgment). Some members of the Court may be prepared to revisit *Smith*, with a view to overruling it as a departure from sound constitutional jurisprudence. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) ("in a case presenting the issue, the Court should re-examine the rule *Smith* declared"); *see also Swanner v. Anchorage Equal Rights Commission*, 115 S. Ct. 460 (1995) (Thomas, J., dissenting from denial of certiorari) (urging adherence to compelling interest standard in RFRA).

In our view the Court should reverse *Smith*. The sooner, the better. But as long as the Court is not prepared to do so, it should at least act promptly to remove any lingering doubt that Congress acted well within its powers when it responded to *Smith* with appropriate remedial legislation to safeguard religious freedom. This

case affords the Court a clean record and a clear opportunity to signal to the Nation that it meant what it said when it sent the religious communities to the legislative branch to secure our most cherished religious beliefs and practices. *Smith, supra,* 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

CONCLUSION

For the foregoing reasons, the amicus respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted, and that the judgment of that court be affirmed.

Respectfully submitted,

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APPENDIX A

Members of the Coalition for the Free Exercise of Religion

The members of the Coalition for the Free Exercise of Religion include: Agudath Israel of America, The Aleph Institute, American Association of Christian Schools, American Baptist Churches USA, American Civil Liberties Union, American Conference on Religious Movements, American Ethical Union – Washington Ethical Action Office, American Humanist Association, American Jewish Committee, American Jewish Congress, American Muslim Council, Americans for Democratic Action, Americans for Religious Liberty, Americans United for Separation of Church & State, Anti-Defamation League, Association of Christian Schools International, Association of American Indian Affairs, Baptist Joint Committee on Public Affairs, B'nai B'rith, Central Conference of American Rabbis, Christian Church (Disciples of Christ), Christian Legal Society, Christian Life Commission, Southern Baptist Convention, Christian Science Committee on Publication, Church of the Brethren, Church of Jesus Christ of Latter-day Saints, Church of Scientology International, Coalition for Christian Colleges and Universities, Coalitions for America, Concerned Women for America, Council of Jewish Federations, Council on Religious Freedom, Council on Spiritual Practices, Criminal Justice Policy Foundation, Episcopal Church, Evangelical Lutheran Church in America, Friends Committee on National Legislation, General Conference on Seventh-day Adventists, Guru Gobind Singh Foundation, Hadassah – the Women's Zionist Organization of America, Inc., Home School Legal Defense Association, International

Association of Jewish Lawyers and Jurists, International Institute for Religious Freedom, Japanese American Citizens League, The Jewish Reconstructionist Federation, Justice Fellowship, Mennonite Central Committee U.S., Muslim Prison Federation, National Association of Evangelicals, National Campaign for a Peace Tax Fund, National Council of Churches of Christ in the USA, National Council of Jewish Women, National Council on Islamic Affairs, National Jewish Commission on Law and Public Affairs, National Jewish Community Relations Advisory Council, National Sikh Center, Native American Church of North America, Native American Rights Fund, North American Council For Muslim Women, People For the American Way Action Fund, Peyote Way Church of God, Rabbinical Council of America, Soka-Gakkai International-USA, Traditional Values Coalition, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, Unitarian Universalist Association of Congregations, United Church of Christ – Office for Church in Society, United Synagogue of Conservative Judaism, Women of Reform Judaism – Federation of Temple Sisterhoods.